(1)

Last page of docket

SHDKT PROCEEDINGS AND ORDERS DATE: [04/23/92]

CASE NBR: [91106751] CSY STATUS: [DECIDED]
SHORT TITLE: [Trevino, Joe M.]
VERSUS [Texas] DATE DOCKETED: [121791]
*** CAPITAL CASE -- No date of execution set *** PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Dec 17 1991	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Jan 16 1992		Brief of respondent Texas in opposition filed.
3	Jan 23 1992		DISTRIBUTED. February 21, 1992
6	Feb 14 1992		Reply brief of petitioner Joe Trevino filed.
5	Feb 19 1992		Record requested.
7	Mar 2 1992		Record filed.
		*	Original proceedings from Court of Criminal Appeals, Texas (2 boxes-Box 1-Vols 1-28, Box 2-Vols 29-38)
8	Mar 5 1992		REDISTRIBUTED. March 20, 1992
10	Mar 23 1992		REDISTRIBUTED. March 27, 1992
12	Mar 30 1992		REDISTRIBUTED. April 3, 1992
14	Apr 6 1992		Petition GRANTED. Judgment REVERSED and case REMANDED Opinion per curiam.

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PREVIOUS 1 1 EXIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(2)

NO. _____ 91-6751

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

JOE MARIO TREVINO, JR.,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

AFFIDAVIT
IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

THE STATE OF TEXAS)
)
COUNTY OF WALKER)

BEFORE ME, the undersigned authority, on this day personally appeared JOE MARIO TREVINO, JR., who after having been duly sworn upon oath, did state the following:

"I, JOE MARIO TREVINO, JR., being first duly sworn, depose and say that I am the Petitioner, in the above-entitled case; that in support of my motion to proceed on petition for writ of certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I

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91-6751

believe I am entitled to redress; and that the issues which I desire to present through petition for writ of certiorari are the following: (i) whether, although I challenged the state's preemptory striking of every African-American from my jury in my December 19, 1985 appellate brief, with express reliance upon U.S. Const. amends. VI, XIV and the then undecided Batson v. Kentucky, 476 U.S. 79 (1986), I have nevertheless thereby forfeited the benefit of Batson's eventual equal protection holding; (ii) whether I was denied the right to present matters in mitigation of my death sentence when the trial court precluded the jury from considering, as hearsay, a governmental record containing findings which the custodial agency was charged by law with collecting from a second governmental agency; and (iii) whether either the trial court's refusal to instruct the jury to consider youth, a disruptive family life, good schooling and employment history or, indeed, any matter at all in mitigation of my death sentence, or (iv) such refusal to instruct coupled with the trial court's earlier refusal to excuse three jurors who swore an unwillingness even to consider the offender's youth in mitigation of a death sentence, afforded me an unhampered, individualized and reasoned assessment of the appropriateness of death in light of the personal moral culpability found.

"I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the petition for writ of certiorari are true.

1. Are you presently employed?

No, I am incarcerated in the Institutional Division of the Texas Department of Criminal Justice, on death row.

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

I have had no employment since my incarceration commenced, in January, 1983.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

No.

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

No.

a. If the answer is yes, state the total value of the

items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

There is no one.

"I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury."

JOE MARIO TREVINO, JR.

State of Texas
County of Walker

SUBSCRIBED AND SWORN TO BEFORE ME, this 11th day of December, 1991.

Notary Public in and for the
State of Texas

Notary's Name Printed: _____

BECKY A. TIBBS
NOTARY PUBLIC
STATE OF TEXAS
Commission Expires 6-15-95

QUESTIONS PRESENTED

1. Has a criminal defendant, tried before Batson v. Kentucky, 476 U.S. 79 (1986) - by contemporaneously objecting to prosecutors' historical custom of peremptorily striking African-Americans from juries, and demanding an articulation of prosecutors' reasons for striking all African-Americans from his jury, which the prosecutors resisted on the basis of the fourteenth amendment's equal protection clause - sufficiently raised a cognizable claim on the equal protection clause?

2. Is a trial court's exclusion from evidence of juvenile authorities' psychological assessment of a criminal defendant tending to mitigate against a death sentence - because authenticated not by the state instrumentality that prepared it, but by the state instrumentality statutorily required to secure and keep it - an unduly mechanistic application of the hearsay rule inflaming the risk of a cruel and unusual punishment?

3. Does a trial court's refusal - having charged a jury to sentence a criminal defendant to death upon finding only the "deliberate[ness]" of a capital offense and "a probability" of his future dangerousness - to inform the jury that it could consider and give effect to mitigating evidence in making these factual findings, unduly cramp the sentencer's individualized, moral assessment of the appropriateness of punishing a particular defendant from disadvantaged circumstances with death?

4. Does a trial court's refusal - having refused also to inform a sentencing jury that it could consider a criminal

defendant's youth in weighing whether to punish him with death - to excuse for cause prospective jurors avowedly unwilling to consider his youth, unduly "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty"?

LIST OF PARTIES

All parties to the proceeding before the Court of Criminal Appeals of the State of Texas appear in the present caption.

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II. The Court of Criminal Appeals' exclusion from the jury considering death at the sentencing stage, of juvenile authorities' psychological report of parental neglect and abuse in petitioner's childhood, as having been prepared by authorities different from though statutorily required to report such information to the custodial, authenticating authority, applied the hearsay rule, in disregard of Chambers v. Mississippi, 410 U.S. 284 (1973), far more mechanistically than the federal courts of appeals for the third, sixth, seventh and ninth circuits, to obstruct petitioner's U.S. Const. amends. VI, VIII, XIV presentation of evidence insuring against the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." . 15

III. The Court of Criminal Appeals' ruling that a criminal jury - charged with returning a death sentence upon finding only a "deliberate" capital offense and "a probability" of future dangerousness - need not even be informed that it could consider, in making these two factual findings, mitigating evidence of petitioner's "disruptive" childhood home, "risk[s]," in derogation of U.S. Const. amends. VIII, XIV and in conflict with the interpretations of Penry v. Lynaugh, 492 U.S. 302 (1989) of the supreme court of Oregon and the federal court of appeals for the fifth circuit, "that the death penalty will be imposed in spite of factors which will call for a less severe penalty." 19

IV. The Court of Criminal Appeals' ruling that prospective jurors - whom the trial court refused to inform could consider the mitigating circumstances of petitioner's youth - avowedly unwilling to consider petitioner's youth in assessing the appropriateness of sentencing him to death, need not be excused from the jury for cause, wholly disregards this Court's interpretation of U.S. Const. amends. VIII, XIV in Eddings v. Oklahoma, 455 U.S. 104 (1982) that "neither may the sentencer refuse to consider . . . any relevant mitigating evidence." . . . 22

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

JOE MARIO TREVINO, JR.,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner herein prays that a Writ of Certiorari issue to the Court of Criminal Appeals of the State of Texas to review that Court's June 12th, 1991 judgment and order in this proceeding.

OPINIONS BELOW

The judgment and opinions of the Court of Criminal Appeals of the State of Texas from which review is sought, are reported at 815 S.W.2d 592 (Tex. Crim. App. 1991), and are attached as appendix A, and the Court's denial of petitioner's motion for rehearing is reported at 815 S.W.2d 592 (Tex. Crim. App. 1991), and petitioner's postcard notification thereof is attached as appendix B, to this petition.

JURISDICTION

The Court of Criminal Appeals of the State of Texas entered the judgment from which review is sought, June 12th, 1991, and denied a timely motion for rehearing, September 18th, 1991. Jurisdiction is now conferred upon this Court by 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

U.S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tex. Rev. Civ. Stat. art. 3731a, § 1:

> Any written instrument, certificate, record, part of record, return, report, or part of report, made by an officer of this State or of any governmental subdivision thereof, or by his deputy, or person or employee under his supervision, in the performance of the functions of his office and employment shall be, so far as relevant, admitted in the courts of this State as evidence of the matter stated therein, subject to the provisions in Section 3.

Tex. Rev. Civ. Stat. art. 3737e, §§ 1, 2:

Sec. 1. A memorandum or record of an act, event or condition shall, insofar as relevant, be competent evidence of the occurrence of the act or event or the existence of the condition if the judge finds that:

(a) It was made in the regular course of business;

(b) It was the regular course of that business for an employee or representative of such business with personal knowledge of such act, event or condition to make such memorandum or record or to transmit information thereof to be included in such memorandum or record;

(c) It was made at or near the time of the act, event or condition or reasonably soon thereafter.

Sec. 2. The identity and mode of preparation of the memorandum or record in accordance with the provisions of paragraph one (1) may be proved by the testimony of the entrant, custodian or other qualified witness even though he may not have personal knowledge as to the various items or contents of such memorandum or record. Such lack of personal knowledge may be shown to affect the weight and credibility of the memorandum or record but shall not affect its admissibility.

Tex. Rev. Civ. Stat. art. 5143d, § 1:

The purpose of this chapter is to provide for administration of the state's correctional facilities for delinquent children, to provide a program of constructive training aimed at rehabilitation and reestablishment in society of children adjudged delinquent by the courts of this state and committed to the Texas Youth Council, and to provide active parole supervision for delinquent children until officially discharged from custody of the Texas Youth Council.

Tex. Rev. Civ. Stat. art. 5143d, § 7:

To effectuate the purpose of this chapter and to make maximum use of existing facilities and personnel, all departments and agencies of the state and all officers and employees of the state, when requested by

the council, shall cooperate with it in all activities consistent with their proper functions.

Tex. Rev. Civ. Stat. art. 5143d, § 16:

The council shall keep written records of all examinations and conclusions based on them and of all orders concerning the disposition or treatment of each delinquent child subject to its control. These records are not public and are available only on the order of a district court.

Tex. Rev. Civ. Stat. art. 5143d, § .25(a):

In carrying out its duties, the council may make use of law-enforcement, detention, supervisory, medical, educational, correctional, and other facilities, institutions, and agencies in the state. This section does not authorize the council to assume control of any other agency, institution, or facility in the state, or to require any agency, institution, or facility to serve the council in a manner inconsistent with its authority or function or with any law or regulation governing its activity.

Tex. Code Crim. Proc. art. 37.071:

Art. 37.071. Procedure in capital case

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against a sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to

the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on or is unable to answer any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

STATEMENT OF THE CASE

An elderly woman was raped and murdered on January 17th, 1983 in Haltom City, Texas, a crime, carrying the penalty of death, with which Joe Mario Trevino, Jr., petitioner, a twenty year old hispanic, was charged.

The hispanic petitioner moved the trial court in advance to prohibit his prosecutors from resorting to their "historical[] and habitual[]" "use of peremptory challenges to strike prospective jurors merely based on the fact of race, . . . to strike black people and other minorities who are otherwise qualified, . . . to strike prospective black jurors in [an] effort to produce an ethnically pure, all white, jury," 1A Rec. 280-81 - and, consistent with their alleged past practices, the prosecutors found three African-American prospective jurors on the venire, and peremptorily struck them all. 11 Rec. 303; 25 Rec. 2932; 27 Rec. 3292. The petitioner's June 15th and June 25th, 1984 objection and requests that the prosecutors "articulate [their] reasons" for having peremptorily stricken prospective jurors "from a specific ethnic group or cognizable group, which is readily identifiable," were overruled. 27 Rec. 3293-97; 30 Rec. 5-7.

Three white veniremembers swore they could or would not, in sentencing a defendant convicted of such a capital murder, consider his youth mitigating. 20 Rec. 1925; 21 Rec. 2213-15; 22 Rec. 2282-83. The petitioner's seriatim requests that the court excuse these veniremembers for cause, for their "bias or prejudice not to consider such evidence," 20 Rec. 1929, their "expressed bias

against the law dealing with age and in setting the punishment in a death penalty case," 21 Rec. 2221, their "candid[]" refusal "not under any circumstances [to] consider the youthful age in mitigation," 22 Rec. 2289, were overruled, 20 Rec. 1929; 21 Rec. 2222; 22 Rec. 2289, forcing petitioner to exhaust his limited peremptory challenges on these veniremembers, 20 Rec. 1929; 21 Rec. 2224; 22 Rec. 2289, three peremptory challenges petitioner's counsel would otherwise have spent on three other objectionable prospective jurors, ultimately seated. 1A Rec. 327, 330, 336-38; 30 Rec. 15-16, 17-19.

The petit jury, without an African-American, was seated, and found petitioner guilty.

A prosecution witness on sentencing, a caseworker with the state agency given custody of petitioner as a child theft offender, testified on cross-examination to petitioner's childhood spent in "a disruptive home," 36 Rec. 771, a "[v]ery poor family background," id. at 780; and identified as "part of the official records" of his agency, id. at 778, which his agency was required to secure from other agencies in the state, and keep, Tex. Rev. Civ. Stat. art. 5143d, §§ 7, 16(c), 25, a psychological assessment of the young petitioner prepared by the Harris County, Texas Department of Education, attributing his childhood "stealing" to "a neglectful home environment in a poor, deteriorating, inner-city neighborhood," and to a "father . . . frequently abusive to [his mother] and the children." 1B Rec. 251-54. The court ruled the report of the assessment, though authenticated by certificate of

the custodian of the official records of the Texas Youth Council as both a business, Tex. Rev. Civ. Stat. art. 3737e, and public record, id. art. 3731a, of the Texas Youth Council, 1B Rec. 255, inadmissible hearsay, and excluded the psychological assessment from the jury's sentencing deliberations, 36 Rec. 837, and then refused petitioner's requests that it inform the jury even that it could consider, in answering the two narrowly worded, statutory special issues, Tex. Code Crim. Proc. art. 37.071, evidence of petitioner's "social history and background," 1A Rec. 381-82, his youth, id. at 367-68, his "immaturity," id. at 377-78, other "extenuating circumstances," id. at 383-84, or virtually any other matter mitigating against a death sentence. Id. at 385-90.

The petitioner was given a death sentence; and the Court of Criminal Appeals - despite petitioner's December 19th, 1985 arguments that, expressly presaging Batson v. Kentucky, 476 U.S. 79 (1986), the federal constitution's sixth and fourteenth amendments required some articulation of the prosecutors' reasons for peremptorily striking all African-Americans from his jury, Brief of the Appellant at 11-17, Trevino v. State, 815 S.W.2d 592 (Tex. Crim. App. 1991), the eighth and fourteenth amendments required some instruction that the jury could, id. at 65-66, and required excusing for cause prospective jurors who could not, id. at 18-21, give individualized consideration to petitioner's evidence mitigating against a death sentence, and the sixth, eighth and fourteenth amendments required submitting to the sentencing jury the mitigating, psychological records of the state juvenile

agency given custody of petitioner as a child, id. at 1-10 - affirmed his conviction and sentence.

REASONS FOR GRANTING THE WRIT

I. The Court of Criminal Appeals' disentitling petitioner from contesting prosecutors' peremptory removal of all African-Americans from his jury, as having not raised a claim on the equal protection clause of U.S. Const. amend. XIV - though petitioner, in fact, presaging Batson v. Kentucky, 476 U.S. 79 (1986), contemporaneously objected to the consistency with prosecutors' historical custom of, and demanded an articulation of prosecutors' reasons for their race-laden peremptory strikes, which the state resisted on the basis of the equal protection clause - conflicts directly with this Court's recent recognition of such an equal protection clause claim in strikingly similar arguments, in Ford v. Georgia, 498 U.S. ___, 111 S. Ct. ____, 112 L.Ed.2d 935 (1991).

At his trial for capital murder, petitioner, a hispanic, faced a jury from which the state had peremptorily stricken the only three African-American venirepersons, 11 Rec. 303-04; 25 Rec. 2932; 27 Rec. 3292-93, and the resulting jury, no African-Americans on it, sentenced him to death.

An African-American petitioner, in Ford v. Georgia, 498 U.S. ___, 111 S. Ct. ___, 112 L. Ed.2d 935, 946 (1991), complained of the wholesale peremptory removal of African-Americans from his jury, but, Batson v. Kentucky, 476 U.S. 79 (1986) not yet having been decided, he called into play only the federal constitution's sixth amendment, not the fourteenth. Because he alleged the essence of a violation of the fourteenth amendment's equal protection clause, however, namely his state's prosecutors' "pattern of excluding black persons from juries 'over a long period of time,'" accord Johnson v. State, 731 P.2d 993, 998-999 (Okla. Crim. App.), cert. denied, 484 U.S. 878 (1987), and because the state tactically chose to oppose him on the basis of the equal

protection clause, accord Batson, 476 U.S. at 84 n.4 ("the State has insisted that petitioner is claiming a denial of equal protection and that we must reconsider Swain to find a constitutional violation on this record"); id. at 109 (Stevens J., concurring) ("the party defending the judgment has explicitly rested on the issue in question as a controlling basis for affirmance"), this Court held petitioner Ford "must be treated as having raised" a claim on the equal protection clause. Ford, 112 L.Ed2d at 946-47.

Petitioner Trevino, too, alleged the essence of a violation of the equal protection clause, when on February 1st, 1984, he moved his trial court to prohibit the state's

> use of peremptory challenges to strike prospective jurors merely based on the fact of race. The prosecution, the State of Texas, historically and habitually uses its peremptory challenges to strike black people and other minorities who are otherwise qualified. These peremptory challenges are exercised by the State of Texas to strike prospective black jurors in its efforts to produce an ethnically pure, all white jury[,]

1A Rec. 280-81, and when on June 15th, 1984, petitioner's counsel moved

> that the State articulate its reasons for using a peremptory strike when they have use[d] a[] peremptory strike to strike a person from a specific ethnic group or cognizable group, which is readily identifiable[,]

27 Rec. 3294, and when on June 25th, 1984, before the jury was sworn, still two years before Batson, petitioner's counsel re-urged his June 15th motion:

> Here are two black females that were struck by the State after they articulated in their questions - in their answers to the voir dire that they were in favor of the death penalty or could inflict the death penalty

> under certain conditions, yet they were not - yet, the State went on to strike them by peremptory challenge; and in contrast to that, I would suggest to the Court that juror number 12, which is Judy M. Barnes was very close to the same or similar position that jurors Sanders and Hollie were, and yet the State did not exercise a p[er]emptory challenge; and as the record will reflect Judy M. Barnes is a white female who is on the jury and was selected.
>
> For those reasons and for reasons that are urged in the motion number 66A, I ask the Court to instruct the State to articulate now the reasons for the exercise of those p[er]emptory challenges as to Sanders and Hollie[,]

30 Rec. 6-7 - and far from "expressly disavow[ing]" the essence of a Batson claim on appeal, cf. Holland v. Illinois, 493 U.S. ___, 110 S. Ct. _____, 107 L.Ed.2d 905, 923 (1990) (Marshall, J., dissenting), petitioner Trevino's December 19th, 1985 brief in the Court of Criminal Appeals, still months before Batson, argued expressly from the sixth and fourteenth amendments, expressly from Swain v. Alabama, 380 U.S. 202 (1965), and, indeed, expressly from Batson. Brief of the Appellant at 11, 12-13, 16, Trevino v. State, 815 S.W.2d 592 (Tex. Crim. App. 1991).

The State of Texas tactically chose to defend its peremptory removal of all three African-American venirepersons on the basis of the equal protection clause and Batson:

> Appellant contends that the State's use of peremptory challenges to exclude three black jurors violated Appellant's constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution. Batson v. Kentucky, 39 Crim. L. Rep. 3061 (April 30, 1986). However, Batson, decided under the equal protection clause, is not applicable to Appellant since he is a member of the Hispanic race.
>
> . . .
>
> . . . [A]n Equal Protection claim can be directed only at the purposeful exclusion of the defendant's own

> race from the jury. . . . In the case at bar, Appellant is member of the hispanic race. He is complaining of the State's use of peremptory challenges against three black veniremen. He has no standing under the Equal Protection Clause to assert such a claim. [State's Brief at 14, 16, Trevino v. State, 815 S.W.2d 592 (Tex. Crim. App. 1991).]
>
> Appellant's second ground of error argues that reversal is required under Batson v. Kentucky, 106 S. Ct. 1712 (1986). The State has ar[gu]ed that Batson does not apply because Appellant is not challenging the exclusion of prospective jurors whose race is the same as his own. [State's Supplemental Brief at 1, Trevino v. State, 815 S.W.2d 592 (Tex. Crim. App. 1991).]

Cf. Powers v. Ohio, 499 U.S. ___, 111 S. Ct. ___, 113 L.Ed.2d 411 (1991) (renouncing bar to criminal defendant's challenge to exclusion of venirepersons of races other than his own).

Because petitioner Trevino has, consistently, alleged the essence of a violation of the fourteenth amendment's equal protection clause, even invoking Batson, and because the State of Texas has tactically chosen to join petitioner's arguments on the equal protection clause and Batson, and because this Court has held that therefore "petitioner must be treated as having raised" a claim on the equal protection clause, Ford v. Georgia, 112 L.Ed.2d at 946, it is mystifying that the Texas courts feel petitioner has raised no equal protection claim, and for that reason alone can have not even a Batson hearing into the peremptory removal of all African-Americans from his capital murder jury.

II. The Court of Criminal Appeals' exclusion from the jury considering death at the sentencing stage, of juvenile authorities' psychological report of parental neglect and abuse in petitioner's childhood, as having been prepared by authorities different from though statutorily required to report such information to the custodial, authenticating authority, applied the hearsay rule, in disregard of Chambers v. Mississippi, 410 U.S. 284 (1973), far more

mechanistically than the federal courts of appeals for the third, sixth, seventh and ninth circuits, to obstruct petitioner's U.S. Const. amends. VI, VIII, XIV presentation of evidence insuring against the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."

Juvenile authorities had, before his teen years, delivered petitioner Trevino into the custody of the Texas Youth Council, the state agency charged with "mak[ing] maximum use of existing facilities and personnel" for the purpose of effectively treating delinquent children, Tex. Rev. Civ. Stat. art. 5143d, §§ 1, 7, and the state agency consequently required to collect and "keep written records of all examinations and conclusions based on them . . . of each delinquent child," id. at § 16(c), from "law-enforcement, detention, supervisory, medical, educational, correctional, and other facilities, institutions, and agencies in the state," id. at § 25, all of whom were, in turn, statutorily required to cooperate with the Council. Id. at § 7. In the course of determining the appropriate placement for the young Joe Trevino, Jr., the Council obtained from the Harris County, Texas Department of Education its psychological associate's psycho-educational evaluation recounting the boy's "neglectful home environment in a poor, deteriorating, inner-city neighborhood," his father's "frequent[] abus[e]" of his mother and their children, and the boy's diagnosed "minimal cerebral dysfunction, dyslexia, [and] emotional problems," and carefully concluding that petitioner's "neglectful home environment, inadequate supervision, delinquent familial influence" partly underlay his "stealing," 1B Rec. 251-54 - a finding certainly relevant to an individualized assessment of the

appropriateness of his eventual death sentence "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (quoting with approval California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

The report of Harris County's psychological findings, so patently mitigating against petitioner's death sentence, was of course, at the least, a business, see Tex. Rev. Civ. Stat. art. 3737e, or public record, see id. art. 3731a, of that governmental subdivision of the state, admissible into evidence at petitioner's sentencing through the Youth Council, the state agency given custody of it; at least as admissible as the unauthenticated physicians' statements collected in an insurance company's files -

> Representatives of insurance companies came to court and authenticated the records. The prosecutor clearly established the prerequisites for admitting the records under the business records exception.[1] But the defendants argue that the insurance company records contained other unauthenticated medical records and statements by doctors. They contend that these medical records and statements are hearsay not falling within the business records exception. . . .
>
> We reject this argument. The insurance companies compiled their records from the business records of hospitals. Because the medical records from which the insurance company records were made were themselves business records, there was no accumulation of inadmissible hearsay. . . .
>
> There is no requirement that the witness who lays the foundation be the author of the record or be able to personally attest to its accuracy. United States v. Iredia, 866 F.2d 114, 119-20 (5th Cir.), cert. denied, ___ U.S. ___ , 109 S. Ct. 3250, 106 L.Ed.2d 596 (1989); Theriot v. Bay Drilling Corp., 783 F.2d 527, 533 (5th Cir. 1986). Furthermore, there is no requirement that the records be created by the business having custody of them. Mississippi River Grain Elevator, Inc. v. Bartlett & Co., Grain, 659 F.2d 1314, 1319 (5th Cir. Unit A 1981); United States v. Veytia-Bravo, 603 F.2d 1187, 1189 (5th Cir. 1979), cert. denied, 444 U.S. 1024, 100 S. Ct. 686, 62 L.Ed.2d 658 (1980). [United States v. Duncan, 919 F.2d 981, 986 (5th Cir. 1990), cert. denied, 111 S. Ct. 2036 (1991)]

- but, what's more, when as here, the agency keeping the report was statutorily obligated to collect it from an external author who, in turn, was statutorily obligated to cooperate, then, for example, the extrinsic, unsigned notation added to the margin of a letter returned to a selective service board is admissible in evidence through the selective service board, because the author has acted as an agent of, and her report has become an "official record" of the custodial agency itself. United States v. Holmes, 387 F.2d 781, 783-84 (7th Cir.) (citing with approval La Porte v. United States, 300 F.2d 878 (9th Cir. 1962)), cert. denied, 391 U.S. 936 (1968). Indeed, a state's witness, Mr. Allen Wallace, a Youth Council caseworker and security director, testified that Harris County's psycho-educational evaluation of petitioner was "part of the official records" of the Youth Council, 36 Rec. 778 - so petitioner tendered the evaluation, further authenticated by certificate of the Youth Council's records custodian, 1B Rec. 255, to the trial court at his sentencing. 36 Rec. 834.

So long as the opponent of such extrinsic evidence makes no "affirmative showing that the proffered evidence is untrustworthy,"

United States v. Versaint, 849 F.2d 827, 832 (3rd Cir. 1988); see also Baker v. Elcona Homes Corp., 588 F.2d 551, 558 (6th Cir. 1978), cert. denied, 441 U.S. 933 (1979) - and, here, the state made not even a pretense of affirmatively showing the external author untrustworthy - then information from extrinsic sources is admissible, particularly in criminal sentencing, and the sentencer may rely, for example, on a "presentence report, which included reports from several Idaho psychiatrists, a previous presentence report from an Ohio conviction containing reports from Ohio psychologists, psychiatric evaluations from Oregon doctors, and numerous newspaper articles and editorials," to impose a sentence of death. Creech v. Arave, 928 F.2d 1481, 1488 (9th Cir. 1991).

Since, "[i]n contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the constitution limits a state's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence," McCleskey v. Kemp, 481 U.S. 279, 304 (1987), a state may certainly not fastidiously narrow the sentencer's consideration of extrinsic, mitigating evidence to any closer a circle of sources than were relied upon in Creech to warrant imposition of a death sentence; but the Texas courts, in spite of Chambers v. Mississippi, 410 U.S. 284, 302 (1973)'s admonition that "the hearsay rule may not be applied mechanistically to defeat the ends of justice," ruled the Harris County, Texas Department of Education's mitigating psychological assessment of petitioner Trevino, though "part of the official

records" of the Texas Youth Council, inadmissible hearsay, 36 Rec. 837, and withheld it from the jurors who then sentenced petitioner to death.

III. The Court of Criminal Appeals' ruling that a criminal jury - charged with returning a death sentence upon finding only a "deliberate" capital offense and "a probability" of future dangerousness - need not even be informed that it could consider, in making these two factual findings, mitigating evidence of petitioner's "disruptive" childhood home, "risk[s]," in derogation of U.S. Const. amends. VIII, XIV and in conflict with the interpretations of Penry v. Lynaugh, 492 U.S. 302 (1989) of the supreme court of Oregon and the federal court of appeals for the fifth circuit, "that the death penalty will be imposed in spite of factors which will call for a less severe penalty."

A prosecution witness, a caseworker with the Texas Youth Council in whose care petitioner Trevino had been placed for his childhood "stealing," see 1B Rec. 253, on cross-examination testified petitioner had come from "a disruptive home," a "[v]ery poor family background," 36 Rec. 771, 780 - a disadvantaged background which, if explanatory of subsequent criminal acts,[1] has historically been thought to lessen sometimes the criminal defendant's personal blameworthiness, Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (citing with approval California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)), and warrant "instructions informing the jury that," beyond the only two issues given it at sentencing,

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[1] The report of the Harris County, Texas Department of Education's psychological assessment of petitioner as a juvenile attributed his "stealing" to "a neglectful home environment in a poor, deteriorating, inner-city neighborhood" in which his "father was frequently abusive to [his mother] and the children," 1B Rec. 251-54; but despite testimony that the report was "part of the official records" of the Texas Youth Council, 36 Rec. 778, and despite an authenticating certificate from the custodian of the official records of the Council, 1B Rec. 255, the trial court excluded the report from the jury as hearsay. 36 Rec. 837.

SPECIAL ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

In your verdict you will answer "Yes" or "No" as you find the fact to be.

ANSWER: _____

SPECIAL ISSUE NO. 2

Do you find from the evidence beyond a reasonable doubt that there is a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

In your verdict you will answer "Yes" or "No" as you find the fact to be.

ANSWER: _____ [1 Rec. 389,]

"it could consider and give effect to [such] mitigating evidence . . . by declining to impose the death penalty." Penry, 492 U.S. at 328.

Just such "traumatic circumstances of [the defendant's] upbringing" were held in Mayo v. Lynaugh, 893 F.2d 683, 688-89 (5th Cir.), modified sub nom. Mayo v. Collins, 920 F.2d 251 (5th Cir. 1990) to present "sufficient 'constitutionally mitigating evidence' to warrant additional jury instruction, 893 F.2d at 689; and the courts of Oregon, the only other state adopting Texas's statutorily limited special issues for the sentencing of persons convicted of capital crimes, see State v. Wagner, 786 P.2d 93, 97 (Or.), cert. denied, 111 S. Ct. 212 (1990), have uniformly read Penry to entitle

such persons "to an instruction that, notwithstanding an affirmative answer to the statutory questions, the jury may conclude that mitigating evidence justifies imposition of a life sentence," Wagner, 786 P.2d at 99, in all circumstances,[2] whatever the quantum of "constitutionally mitigating evidence" presented. See, e.g., State v. Pinnell, 806 P.2d 110, 122-23 (Or. 1991).

But petitioner's trial court, now affirmed, refused petitioner's requests to instruct his sentencing jury that it could consider his "social history and background," 1A Rec. 381-82, or his young age, 1A Rec. 367-68, or his immaturity, 1A Rec. 377-78, or any other "extenuating circumstances," 1A Rec. 383-84, and with the sole exception of "voluntary intoxication" only if "as a result . . . defendant did not know that his conduct was wrong," 1A Rec. 387, the court, much less than assuring the jury's "full consideration" of mitigating evidence, Penry, 492 U.S. at 328, never advised the jury that it could, even in answering the two carefully structured special issues, give any consideration to mitigating evidence, 1A Rec. 385-90 - indeed, much less than "informing the jury that it could consider and give effect to the mitigating evidence . . . by declining to impose the death penalty," Penry, 492 U.S. at 328 (emphasis added), petitioner's trial court's closing instruction prohibited his sentencers from even considering such effect:

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[2] See, e.g., State v. Stevens, 806 P.2d 92, 110 (Or. 1991); State v. Douglas, 800 P.2d 288, 294 (Or. 1990); State v. Simonsen, 798 P.2d 241, 242 (Or. 1990); State v. Guzek, 797 P.2d 1031, 1034 (Or. 1990); State v. Smith, 791 P.2d 836, 853 (Or. 1990); State v. Hefstad, 789 P.2d 1326, 1351 (Or. 1990); State v. Montez, 789 P.2d 1352, 1380-81 (Or. 1990); State v. Moen, 786 P.2d 111, 140-42 (Or. 1990); State v. Miranda, 786 P.2d 155, 160-61 (Or. 1990); State v. Farrar, 786 P.2d 161, 189-90 (Or. 1990).

During your deliberations you shall not consider or discuss what the effect of you[r] answer to the above issues might be. [1A Rec. 390.]

IV. The Court of Criminal Appeals' ruling that prospective jurors - whom the trial court refused to inform could consider the mitigating circumstances of petitioner's youth - avowedly unwilling to consider petitioner's youth in assessing the appropriateness of sentencing him to death, need not be excused from the jury for cause, wholly disregards this Court's interpretation of U.S. Const. amends. VIII, XIV in Eddings v. Oklahoma, 455 U.S. 104 (1982) that "neither may the sentencer refuse to consider . . . any relevant mitigating evidence."

Voir dired on their willingness, in choosing between sentences of life and death, to consider petitioner Trevino's youth - twenty years old when charged with a capital offense, twenty-two years old when tried and sentenced to death - three venirepersons were unwilling:

Q. [defense counsel:] In dealing with the death penalty and dealing with the factual issues that you have to answer, could you consider as mitigation or in lessening the punishment the youthful age of the person convicted of capital murder?

A. [venireperson Berlin:] The youthful age; no. [20 Rec. 1925.]

. . .

Q. [defense counsel:] You know, in dealing with the issues that are going to be raised in punishment, all of the evidence is introduced and you are going to be told to base your decision - your decision on those factual issues based upon the evidence.

If there was evidence of youthful age of a defendant convicted of capital murder, would you consider that in setting - in answering those factual issues?

A. [venireperson Mueller:] As far as being a youthful age?

Q. Yes, that the defendant is of a youthful age.

A. No.

Q. You wouldn't consider that at []all?

A. (nods head negatively)

Q. And that would not be part of your consideration on the death penalty?

A. Well, now, are you asking me also that - does that consider the - like the, say, life imprisonment to the death penalty? And you are asking if the younger age would make a difference?

Q. No. Let me clarify that. In the two issues that you would be considering, the factual issues -

A. Okay.

Q. - dealing with probability and with deliberateness, and in answering yes or no on those factual issues, and in dealing with the death penalty, would you consider youthful age, if it is offered into evidence?

A. Well, no, no.

Q. Okay. And that would not enter into the picture of it?

A. No, I don't think - in my opinion, I don't think the age would make any difference if, again, the evidence was there. This again, being whether it was not guilty or guilty in my mind, but no, if I felt one way - you know, if the evidence did not no, I wouldn't let the age get involved with that.

Q. Now we are talking about punishment.

A. Yes, sir.

Q. Okay. So you would set that aside and wouldn't consider it?

A. No, because, again, I'm looking in my mind at what you are asking me and yet, I would be looking at the complete case that would be over to get to this point of the trial. And I wouldn't say that I could let the age, you know, affect my decision as far as guilty or not guilty.

Q. Okay. I'm talking about the punishment. I may

be misunderstanding your answer but I'm dealing with only the punishment stage. You have already found him guilty.

A. Okay.

Q. And now you are considering just the issues deciding whether a person is sentenced to a life sentence or a death sentence.

A. Uh-huh.

Q. And I believe that your answer is that you would not consider the age -

A. Yes, you are right.

Q. And that would not enter into your deliberations on setting - on answering those issues; is that correct?

A. Yes, sir. [21 Rec. 2213-15.]

. . .

Q. [defense counsel:] In deciding - Mr. Barbee, in deciding whether to impose the death penalty, would the youthful age of the person accused be of any significance to you in resolving that decision?

A. [venireperson Barbee:] The age that the defendant is?

Q. Yes, sir.

A. Would his age -

Q. Yeah, would the age, the youthful age of any person accused, be of any significance to you in resolving the issue as to whether or not the death penalty ought to be imposed?

A. No, sir. [22 Rec. 2282-83.]

These venirepersons, in whom the state would repose the "choice . . . between life and death," Lockett v. Ohio, 438 U.S. 586, 605 (1978), were constitutionally, simply not free to "refuse to consider . . . any relevant mitigating evidence," to "give it

no weight by excluding such evidence from their consideration," Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982), especially so "rudimentary" a mitigating circumstance as the defendant's youth, Penry v. Lynaugh, 492 U.S. 302, 357 (1989) (Scalia, J., concurring in part and dissenting in part); accord Eddings, 455 U.S. at 115 ("youth must be considered a relevant mitigating factor") - and they would not have been disabused of their false belief, cf. Stone v. Dugger, 837 F.2d 1477, 1478-79 (11th Cir. 1988), cert. denied, 489 U.S. 1071 (1989), in the propriety of ignoring petitioner's youth by the trial judge, who ultimately refused to instruct the sentencing jury, under Eddings, to consider petitioner's youth, 1A Rec. 367-68, or virtually any other extenuating circumstance, 1A Rec. 383-84, and who would have left these three venirepersons "substantially impaired" by their unwillingness to perform one of the sentencer's "essential" responsibilities under Eddings and Penry, 492 U.S. at 328 to give "full consideration" to any evidence mitigating against the death penalty:

> [I]t follows that a juror who will not, or cannot, consider relevant mitigating evidence pertaining to the defendant because the crime involved is rape and murder is "substantially impaired" under the Adams[v. Texas, 448 U.S. 38 (1980)]-[Wainwright v.]Witt[, 469 U.S. 412 (1985)] test. [State v. Williams, 550 A.2d 1172, 1184 (1988).]
>
> Such jurors would have been excusable for cause under our capital-punishment system. [State v. Biegenwald, 594 A.2d 172, 188 (1991).]

But petitioner's trial judge also refused to excuse any of the venirepersons who admittedly intended to ignore, who refused to consider so rudimentary a mitigating circumstance as petitioner's

youth, for cause. 20 Rec. 1928-29; 21 Rec. 2221-22; 22 Rec. 2288-89.

CONCLUSION

For the foregoing reasons, petitioner prays that a Writ of Certiorari issue to review the June 12th, 1991 judgment and opinion of the Court of Criminal Appeals of the State of Texas.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

Janie Pena PERALEZ, Appellant,

v.

The STATE of Texas, Appellee.

No. 965-90.

Court of Criminal Appeals of Texas, En Banc.

June 12, 1991.

Rehearing Denied Sept. 18, 1991.

Appeal from 183rd Judicial District Court, Harris County; Jay W. Burnett, Judge.

Petition for discretionary review from Court of Appeals, 14th Supreme Judicial District, 796 S.W.2d 240.

Richard C. Bax, Houston, for appellant.

John B. Holmes, Jr., Dist. Atty., Winston E. Cochran, Jr., Ira Jones and Donna Cameron, Asst. Dist. Attys., Houston, Robert Huttash, State's Atty., and Alfred Walker, First Asst., State's Atty., Austin, for State.

Before the court en banc.

OPINION ON STATE'S PETITIONS FOR DISCRETIONARY REVIEW

MALONEY, Judge.

Appellant was indicted for aggravated possession of cocaine with intent to deliver. TEX.REV.CIV.STAT. Art. 4476-15 § 4.03.[1] The trial court overruled appellant's pretrial motion to suppress evidence seized in a search under warrant. Thereafter the appellant waived trial by jury and entered a plea of not guilty. The trial court found appellant guilty after a bench trial and assessed punishment at fifteen years' confinement in the Texas Department of Corrections.[2]

The court of appeals reversed the conviction, holding that the affidavit for search failed to recite sufficient facts to establish the existence of probable cause by the totality of the circumstances. *Avilez v. State*, 796 S.W.2d 240 (Tex.App.—Houston [14th Dist.], 1990).[3] We originally granted the State's petitions for discretionary review to determine the correctness of this holding in light of the State's contention that the court of appeals misapplied the decision in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), by improperly employing the reliability factor of *Aguilar-Spinelli*[4] as part of its analysis.

Upon review of the briefs and arguments of both the State and appellant, we conclude that the State's petitions were improvidently granted. Accordingly, the State's petitions for review are dismissed.

McCORMICK, P.J., and WHITE, J., dissent.

Joe Mario TREVINO, Appellant,

v.

The STATE of Texas, Appellee.

No. 69337.

Court of Criminal Appeals of Texas, En Banc.

June 12, 1991.

Rehearing Denied Sept. 18, 1991.

Defendant was convicted of capital murder and sentenced to death after jury trial in the Criminal District Court No. 2, Tarrant County, L. Clifford Davis, J. Defendant appealed. The Court of Criminal Appeals, McCormick, P.J., held that: (1) exhibit purporting to be psychological assessment of defendant was inadmissible as domestic record or as business record; (2) trial court did not unduly restrict defendant's voir dire examination thereby depriving him of information needed for intelligent exercise of his peremptory challenges; (3) trial court did not abuse its discretion in denying defendant's challenge for cause on basis of jurors' bias against law inasmuch as jurors never had opportunity to testify as to whether they had prejudiced against law; (4) defendant failed to preserve challenge to jury array by failing to present evidence in support of his timely motion until after jury had been selected and sworn; (5) defendant voluntarily waived his right to remain silent and his right to counsel; (6) death penalty scheme was constitutional; and (7) trial court was not required to specifically instruct jury that in answering special issues in punishment phase they should consider defendant's age, maturity level, personal social history, and any relevant extenuating circumstances.

Affirmed.

Clinton and Maloney, JJ., dissented with reasons.

1. Repealed and recodified as TEX.HEALTH & SAFETY CODE § 481.112.

2. Now the Texas Department of Criminal Justice, Institutional Division.

3. Appellant's case was decided in a consolidated opinion with that of a codefendant, Francisco Soler Avilez, who died during the pendency of his appeal.

4. *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

APPENDIX A

1. Criminal Law ⇐436(1, 2)

Exhibit purporting to be psychological assessment of defendant was inadmissible in murder trial either as domestic record or as business record, where, although certificate alleged that document was prepared by employee of state youth council, such was not the case, and record did not contain sufficient indicia of reliability to insure integrity of fact-finding process. Vernon's Ann.Texas Civ.St. arts. 3731a, 3737e (Repealed).

2. Jury ⇐33(1.3)

Fact that State struck all black jurors from jury panel in murder trial did not deprive defendant of jury comprising fair cross section of community as guaranteed by Sixth Amendment. U.S.C.A. Const. Amends. 6, 14.

3. Criminal Law ⇐641.12(1)

Defendant's constitutional right to counsel includes under State Constitution right of counsel to question members of jury panel in order to exercise intelligent peremptory challenges. Vernon's Ann.Texas Const. Art. 1, § 10.

4. Jury ⇐131(1)

Ordinarily, trial court should give defendant great latitude in questioning jury panel during voir dire; however, trial court has authority to impose reasonable restrictions upon exercise of voir dire examination for various reasons, among them to curb the prolixity of what can become lengthiest part of criminal proceeding. Vernon's Ann.Texas Const. Art. 1, § 10.

5. Jury ⇐131(4)

Trial court did not abuse its discretion in refusing to allow defendant to question prospective jurors in hopes of binding particular juror to particular course of action without explaining to them what was required under law.

6. Jury ⇐131(4)

Trial court did not abuse its discretion in forcing defendant to inform prospective juror that law required that she base her verdict upon evidence and that she was not to be swayed by public opinion, and to thereafter inquire if she could follow that law rather than attempting to pin juror down as to her mental process in arriving at verdict.

7. Jury ⇐131(17)

Defense counsel's question to prospective juror as to whether, if she could change the law to include more instances where death penalty should be invoked, she would do that was overly broad and impermissible.

8. Jury ⇐131(17)

Trial court did not abuse its discretion in refusing to permit defendant to inquire if prospective juror felt defendant to be "a little bit guilty" because of indictment against him, and requiring defendant to ask question in proper form by stating the law and asking juror if she could follow it.

9. Jury ⇐131(4)

Trial court did not abuse its discretion in excluding repetitious questions by defense counsel of prospective juror regarding juror's friendship with one witness or fact that witness was police officer and how such would affect how juror would judge witness' credibility.

10. Jury ⇐131(17)

Trial court did not prohibit defense counsel from inquiring as to prospective juror's feelings regarding how death penalty would affect his deliberations on punishment issues in capital murder trial by instructing counsel to rephrase its improperly framed question.

11. Jury ⇐131(17)

Trial court did not abuse its discretion in sustaining State's objections to repetitious questions by defense counsel on voir dire regarding prospective juror's feelings about minimum punishment of five years for offense of murder in capital murder trial.

12. Jury ⇐131(17)

Trial court did not improperly restrict defendant's voir dire examination of prospective juror by requiring defense counsel to properly frame clearly deficient question as to juror's feelings regarding minimum punishment of five years for offense of murder.

13. Jury ⇐131(4)

Trial court did not abuse its discretion in sustaining State's objection to repetitious questions regarding whether prospective juror would apply philosophy of "eye for an eye" in arriving at what juror considered fair punishment in capital murder trial.

14. Jury ⇐131(4)

Trial court did not abuse its discretion in limiting defense counsel's voir dire examination of prospective jurors regarding their definition of term "deliberately" in capital murder trial.

15. Criminal Law ⇐1115(2)

Record did not support defendant's contention that State was allowed to ask prospective jurors meaning of term "deliberate" and "intentional" contrary to court's rulings with respect to defendant, where State never asked any of the prospective jurors to define the terms but merely informed the jurors that the terms did not necessarily have same meaning, and State's question seemed to follow a general scheme of explaining to jurors that terms were not necessarily synonymous while defense questions were either open ended or suggested some definition of term to jurors.

16. Criminal Law ⇐1115(2)

Record did not support defendant's contention that on numerous occasions trial court improperly restricted his voir dire after State challenged juror for cause and passed juror to defense for questioning by limiting defense inquiry to area of State's challenge for cause, where record indicated that defense counsel was in no way restricted from asking question he desired to ask, although trial court did admonish defendant to stay within area of challenge for cause.

17. Jury ⇐33(2.1)

Jurors were not biased against law requiring defendant's age to be considered as mitigating factor in sentencing in capital murder trial so as to warrant their excusal, even though jurors stated it was their personal feeling that they would not consider any person's age in answering special issues in trial, where law was never explained to jurors and jurors were never given opportunity to testify as to whether they had prejudiced against law. Vernon's Ann.Texas C.C.P. art. 35.16(c), par. 2.

18. Criminal Law ⇐1166.18

In order to present reversible error defendant must show that he was forced to exercise peremptory challenge to excuse prospective juror to whom his challenge for cause should have been sustained; he then must show that he exhausted his peremptory challenges and was later forced to accept juror whom he found to be objectionable.

19. Jury ⇐83(1)

Trial court abuses its discretion in overruling challenge to prospective juror when it has been established that juror cannot follow law; but until such showing is made, trial court will not be found to have so abused its discretion. Vernon's Ann.Texas C.C.P. art. 35.16(c), par. 2.

20. Jury ⇐107

Prospective juror, who initially testified that she would have to hear evidence presented by defense before she could render verdict, was rehabilitated upon subsequent questioning by State to which she indicated that she initially misunderstood law regarding burden of proof and after law was explained to her that she could follow law.

21. Jury ⇐33(2.1)

Defendant was not deprived of jury of his peers when State was allowed to challenge for cause any prospective juror who was excludable because of his or her views regarding death penalty.

22. Criminal Law ⇐1044.2(1)

Defendant failed to preserve his challenge to jury array based on its alleged underrepresentation of young adults, blacks and Hispanics, even though defendant timely filed his challenge to array, where defendant failed to present evidence in support of his motion until after jury had been selected and sworn.

23. Criminal Law ⇐412.1(2)

Defendant's invocation of right to remain silent was not made during any custodial interrogation, where invocation of right was based on defendant's turning away from detective in his boarding house and attempting to go back to his room after detective approached him and asked him his name and whether he had been in any trouble with the law.

24. Criminal Law ⇐517(7), 517.2(1)

Defendant's rights to remain silent and to have attorney present were not violated when defendant gave his confession to murder, where defendant's prior request to terminate questioning was scrupulously honored and defendant subsequently initiated conversation with police officer six hours later.

25. Indictment and Information ⇐113

Allegation in indictment of constituent elements of offense constituting aggravating feature of capital murder charge was unnecessary, even in face of motion to quash.

26. Criminal Law ⇐1206.1(2)

Death penalty scheme coupled with stringent safeguards of statutory jury instructions provided against arbitrary imposition of death penalty and was constitutional. V.T.C.A., Penal Code §§ 19.03, 19.03(a)(2); Vernon's Ann.Texas P.C. art. 1257 (Repealed); Vernon's Ann.Texas C.C.P. art. 37.071; U.S.C.A. Const.Amends. 8, 14.

27. Criminal Law ⇐1213.7
Homicide ⇐311

Trial court was not required to instruct jury that in answering special issues in punishment phase of capital murder trial they should consider defendant's age, maturity level, personal social history and background and any other relevant extenuating circumstances, and denial of specially requested charges did not violate Eighth and Fourteenth Amendments, where nonspecific evidence of defendant's disruptive and tragic family life was unrelated to any aspect of how or why death would or would not be appropriate response to defendant's actions. U.S.C.A. Const.Amends. 8, 14.

28. Homicide ⇐311

Trial court was not required to instruct jury that in answering special issues in punishment phase of capital murder trial they should consider defendant's age, where mitigating effect of age was presented to jury in context of defendant's ability to reform.

Art Brender, Terry M. Casey and Frank P. Colosi (Court-appointed on appeal), Fort Worth, and Charles Van Cleve (Court-appointed on appeal), Arlington, for appellant.

Tim Curry, Dist. Atty., and C. Chris Marshall, Mary Thornton Taylor and Rufus Adcock, Asst. Dist. Attys., Fort Worth,

Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

McCORMICK, Presiding Judge.

On January 17, 1983, the body of eighty-year-old Blanche Miller was found inside her ransacked home. The victim had been strangled and raped. Numerous items were stolen during the offense including a television, a stereo, a radio and the victim's car. Appellant was convicted of this capital offense and his punishment was assessed at death. This is an appeal from that conviction.

[1] In his first point of error, appellant contends the trial judge reversibly erred during the punishment phase of trial when he refused to allow the introduction of an exhibit purporting to be a psychological assessment of appellant. The Harris County Department of Education at the request of the Harris County Probation Office had conducted a psychological assessment of appellant when he was twelve years old. Appellant's exhibit contained the written findings concerning the psychological assessment. This exhibit was accompanied by a certificate made out by the records custodian of the Texas Youth Council. Said certification averred:

"[T]he records attached hereto consists of true and correct copies of records made by an employee under the direction of a duly qualified officer for the Texas Youth Commission as a consequence of the detention of Joe Mario Trevino, Jr. (Date of Birth: July 25th, 1962).

"Further, the records hereto attached are records of the Texas Youth Commission which were created in the regular course of business, and it was the regular course of business at the Texas Youth Commission for an employee or representative with personal knowledge of the act, event or condition recorded to make the memorandum or record or to transmit information thereof to be included in such memorandum or record; and the memorandum or record was made at or near the time of the act, event or condition recorded or reasonably soon thereafter. The records attached hereto are exact duplicates of the original, and it is a rule of the Texas Youth Commission to not permit the originals to leave my custody."

The State at trial objected to the introduction of the exhibit alleging the certification to be improper. Specifically, the State alleged that the certificate was improper because it stated that the report was compiled by an employee of the Texas Youth Commission, while the exhibit, on its face, was shown to have been prepared by an employee of the Harris County Department of Education. The trial judge sustained the State's objection and denied the admission of the exhibit.

On appeal, appellant contends that although the person making the psychological assessment was not an employee of the Texas Youth Council the record was clearly identified as being an official record of the Texas Youth Council and one of which the Council was charged with obtaining and using. Appellant points out that at the time he was under the jurisdiction of the Texas Youth Council Article 5143d, Section 25, Texas Revised Civil Statutes, empowered the council to "make use of law enforcement detentions, supervisory, medical, educational, correctional, segregative and other facilities, institutions and agencies within the State." Furthermore, appellant argues that under Article 5143d, Section 16, V.A.C.S., the Council was charged with keeping written records "of all examinations and of the conclusions based thereon, and of all orders concerning the disposition or treatment of every delinquent child subject to its control." Appellant argues that the exhibit was an official record of the Texas Youth Council which used many agencies, including the probation departments of the juvenile courts who referred delinquent children to it, as its agents for the preparation and collection of relevant sociological and psychological information on the delinquent children entrusted to it.

The State argues that the exhibit is not admissible under either Article 3731a, V.A.C.S., which provides for admission of domestic records or Article 3737e, V.A.C.S., the Business Records Act (repealed effective September 1, 1986, Texas Rules of Criminal Evidence)[1] and we agree. Clearly the proper predicate was not laid for admission of the exhibit under either Article 3731a or Article 3737e. That is, although the certificate alleged that the document was prepared by an employee of the Texas Youth Council, this was not the case. Both Article 3731a and 3737e require that an employee of the business or of the State generate the record sought to be admitted into evidence. See *Dingler v. State*, 768 S.W.2d 305, 306 (Tex.Cr.App.1989); *Estes v. State*, 162 Tex.Crim. 122, 283 S.W.2d 52, 54 (Tex.Cr.App.1955). See also *Reed v. State*, 811 S.W.2d 582 (Tex.Cr.App.1990).

Furthermore, after examining the exhibit we are persuaded that it does not have "the indicia of reliability" sufficient to insure the integrity of the fact finding process commensurate with the rights of confrontation and cross-examination. The exhibit shows that the author of the report relied on information gleaned from other sources including the Harris County Child Welfare Unit, the Child Guidance Center of Lake Jackson, the Houston Independent School District, and the Great Plains Boys Ranch. Thus the report contains double hearsay. Further, there is nothing in the report to show that the sources of information relied upon by the author were accurate. Moreover, there is nothing in the exhibit to show who performed the psychological tests on appellant and what the qualifications of that person were.

In *Porter v. State*, 578 S.W.2d 742 (Tex.Cr.App.1979), cert. denied, 456 U.S. 965, 102 S.Ct. 2046, 72 L.Ed.2d 491 (1982), we considered a similar situation. There, the State attempted to introduce into evidence several documents from Porter's federal parole file. These documents consisted of various letters discussing Porter's drug use and psychological problems, a warrant application which recommended that Porter's parole be revoked due to his drug use and failure to participate in treatment programs, and a report prepared by an employee of a drug addiction treatment facility which described Porter's poor participation in the treatment program and gave him a poor prognosis. These materials were admitted over Porter's objections and their admission was raised as a point of error on appeal. This Court reversed the conviction recognizing that although certain hearsay evidence may come within a recognized exception to the hearsay rules such evidence is not admissible if it does not have the indicia of reliability sufficient to insure the integrity of the fact finding process. Specifically, we held:

"The documents admitted in this case are letters, or copies of letters, which were kept or received in the District Parole Office in San Antonio. These letters contain hearsay upon hearsay, as well as opinions regarding appellant's mental and physical condition and his amenability to rehabilitation. The sources of these opinions are in most cases unnamed, and in no case are the authors or

1. Article 3731a, the Domestic Records Act, provides in pertinent part as follows:

"Section 1. Any written instrument, certificate, record, part of record, return, report, or part of report, made by an officer of this State or of any governmental subdivision thereof, or by his deputy, or person or employee under his supervision, in the performance of the functions of his office and employment, shall be, so far as relevant, admitted in the courts of this State as evidence of the matter stated therein, subject to the provisions in Section 3."

Article 3737e the Business Records Act, provides in pertinent part as follows:

"Section 1. A memorandum or record of an act, event or condition shall, insofar as relevant, be competent evidence of the occurrence of the act or event or the existence of the condition if the judge finds that:

(a) It was made in the regular course of business;

(b) It was the regular course of that business for an employee or representative of such business with personal knowledge of such act, event or condition to make such memorandum or record or to transmit information thereof to be included in such memorandum or record;

(c) It was made at or near the time of the act, event or condition or reasonably soon thereafter."

the unnamed sources shown to be competent to make the statements attributed to them. It defies reason to suggest that these letters, merely because they were collected in a file in a government office, have the indicia of reliability sufficient to insure the integrity of the fact finding process commensurate with the constitutional rights of confrontation and cross-examination." *Porter*, 578 S.W.2d at 746.

See also *McCrary v. State*, 604 S.W.2d 113, 115 (Tex.Cr.App.1980). We find that the reasoning in *Porter* may be applied in the instant case.[2] The trial court did not abuse its discretion when it denied the admission of the exhibit into evidence. Accordingly, appellant's point of error is overruled.

[2] In his second point of error, appellant asserts that he was deprived of a jury comprising a fair cross-section of the community as guaranteed to him by the Sixth and Fourteenth Amendments in that the State struck all black jurors from the jury panel. This issue has been decided adversely to appellant in *Holland v. Illinois*, 493 U.S. 474, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990). In *Holland*, the Court decided that "[a] prohibition upon the exclusion of cognizable groups through peremptory challenges has no conceivable basis in the text of the Sixth Amendment, is without support in our prior decisions, and would undermine rather than further the constitutional guarantee of an impartial jury." 493 U.S. at ——, 110 S.Ct. at 806.[3] See *Seubert v. State*, 787 S.W.2d 68 (Tex.Cr.App. 1990). See also *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986); *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); and *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1879). We overrule appellant's second point of error.

[3, 4] In several points of error, appellant contends that the trial court unduly restricted his voir dire examination and thereby deprived him of information needed for the intelligent exercise of his peremptory challenges. A defendant's constitutional right to counsel includes, under Article 1, Section 10, Texas Constitution, the right of his counsel to question the members of the jury panel in order to exercise intelligent peremptory challenges. *Powell v. State*, 631 S.W.2d 169, 170 (Tex. Cr.App.1982); *Mathis v. State*, 576 S.W.2d 835, 836–837 (Tex.Cr.App.1979). Ordinarily, the trial court should give the defendant great latitude in questioning the jury panel during voir dire; however, the trial court has the authority to impose reasonable restrictions upon the exercise of the voir dire examination for various reasons, among them to curb the prolixity of what can

2. The *Porter* Court also questioned whether the documents could be considered "official written instruments" under Article 3731a:

> "Clearly, the recordation pursuant to law of official acts, events, or matters relating to the operations of a federal parole office or to particular parolees, about which there can be no reasonable dispute, is done in the performance of the functions of a government officer's official duties. Cf. *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943); *Loper v. Andrews*, 404 S.W.2d 300 (Tex.1966). But the fact that a district parole office makes a practice of maintaining in a file any opinion or conclusion concerning a parolee within the office's charge, regardless of its source, does not necessarily put those statements in the class of records which are kept in the performance of the functions of a government officer's duties. To hold that such informal records are included within Article 3731a, supra, would pervert a rule 'designed to facilitate admission of records which experience has shown to be quite trustworthy.'" *Porter*, 578 S.W.2d at 747 citing *Palmer v. Hoffman*, 318 U.S. 109, 113, 63 S.Ct. 477, 87 L.Ed. 645 (1943).
>
> The same conclusion is made in McCormick & Ray, *Law of Evidence*, Section 1272 (3rd Ed. 1980).

3. Appellant writes that at the time of the preparation of his brief the same issue was pending before the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). This is incorrect. In *Batson*, although the petitioner attempted to premise his claim on "the fair cross-section of the community" requirement found in the Sixth Amendment, the Supreme Court based its opinion on the Equal Protection Clause of the Fourteenth Amendment and expressed no view on the merits of any of the petitioner's Sixth Amendment arguments. *Batson*, 476 U.S. at 124, n. 4, 106 S.Ct. at 1716, n. 4. Appellant before this Court does not rely upon the Equal Protection Clause and, as stated above, the Supreme Court has decided the Sixth Amendment issue adversely to him.

become the lengthiest part of a criminal proceeding. *Bodde v. State*, 568 S.W.2d 344, 350 (Tex.Cr.App.1978), cert. denied 440 U.S. 968, 99 S.Ct. 1520, 59 L.Ed.2d 784 (1979).[4] As this Court stated in *Smith v. State*, 513 S.W.2d 823 (Tex.Cr.App.1974):

> "While appellant certainly has the right to examine the jurors to the end of forming his own conclusions, there is also no doubt that reasonable controls may be exercised by the trial court for various reasons. Voir dire examination can become the lengthiest part of the proceedings.... To curb some prolixity, it is recognized that courts need have a discretionary area within which the examination might be reasonably limited." 513 S.W.2d at 827.

As such, we will reverse a trial court's restriction of voir dire if upon review it is determined that the trial court abused its discretion. *Id.*

[5] In a single point of error, appellant complains that the trial court abused its discretion in limiting the voir dire of prospective jurors Devenport, Berlin and Barbee. Appellant attempted to inquire if the prospective jurors would consider the youthfulness of the offender in mitigation of punishment. At no time did appellant explain to these veniremen that the law requires a juror must be able to consider the age of the offender in the assessment of punishment. The appellant either asked open ended questions ("would you consider evidence of the youthful age of any criminal defendant") or questions wherein he attempted to bind the prospective jurors as to whether they would mitigate punishment due to the age of the offender ("In dealing with the death penalty ..., could you consider as mitigation or in lessening the punishment the youthful age of a person convicted of capital murder"). Appellant was entitled to inform the jurors that the law requires that they consider the age of the defendant in the assessment of punishment and if they could do so. This was not done. Our reading of the record indicates that in all three complained of instances the defense asked questions in hopes of binding the particular juror to a particular course of action without explaining to them what was required under the law. The trial court did not abuse its discretion in refusing to allow the questioning. Appellant's sixth point of error is overruled.

[6] In his seventh point of error, appellant complains that his voir dire examination of prospective juror Emma Graves was impermissibly limited and his ability to exercise intelligently his peremptory strikes was denied when the trial court refused to allow him to ask, "[T]hough, you are going to be asked to judge the facts of the case and can you do that objectively without letting the emotion that might be involved interfere with your duty as a juror to return a true verdict?" The State objected to this question as, "Counsel trying to pin this prospective juror down as to her mental processes in arriving at a verdict." The trial court sustained the objection and told appellant's counsel to rephrase the question. Thereupon appellant's counsel asked:

> "Q. Mrs. Graves, sometimes as a juror, jurors are forced to—in arriving at a verdict, they are forced to take a very unpopular stand with regard to the outcome of a case, and would the fact that if the evidence that was presented in this case, if the evidence failed to meet the burden of proof beyond a reasonable doubt—the definition or whatever that definition of reasonable doubt you may have, if the State didn't meet it's (sic) burden of proof, could you as a juror—even though it may be an unpopular decision with the State *and the members of the family*, could you do that based upon the evidence presented to you in the case? [Emphasis added.]
>
> "A. I would do my best to give an unreasonable doubt—I mean, no unreasonable doubt but impartial—weight all of the evidence before.
>
> "Q. And that would be true even though the result—

4. In the instant case, jury selection began on May 15, 1984, and did not end until June 19, 1984. The transcription of the voir dire examination fills more than 3500 pages of the record.

"A. Either way.

"Q. —might be unpopular to the State?

"A. Yes, sir." (emphasis added)

Graves' responses reflect that appellant received an answer to the question he insists the trial court should have allowed and the record clearly shows that she would render a verdict solely on the evidence and without any regard to the sympathies of the victim's family or anyone else. We cannot say that the trial court abused its discretion in forcing appellant to inform the prospective juror that the law requires that she base her verdict upon the evidence and that she is not to be swayed by public opinion, and to thereafter inquire if she could follow that law. This point of error is without merit and is overruled.

[7] In his ninth point of error, appellant argues that the trial court abused its discretion by refusing to permit the following question:

"Q. Now, setting aside for a moment what the prosecutor has told you about the death penalty, and what the law is regarding the death penalty, if you could change the law to include more instances where the death penalty should be invoked, would you do that?"

The trial court sustained the State's objection to this question commenting, "I don't think the prospective juror has the ability to change the law and that was the effect of your question." Appellant maintains that this ruling prevented him from fully exploring the views and feelings of the prospective juror and also prevented the defense from establishing that the prospective juror was irrevocably opposed to a life sentence in a capital murder case. Appellant also asserts that the court's ruling prevented him from obtaining sufficient information with which to exercise intelligently his peremptory challenges. We disagree.

When counsel asked the prospective juror the open-ended question of how she would change the death penalty law, he was embarking on a global fishing expedition; his question is overly broad and impermissible. See *Smith v. State*, 703 S.W.2d 641, 645 (Tex.Cr.App.1985); *McManus v. State*, 591 S.W.2d 505, 520 (Tex.Cr.App.1980). The trial court did not abuse its discretion in refusing to allow such questioning. This point of error is overruled.

[8] In his tenth point of error, appellant argues that the trial court abused its discretion in limiting the voir dire of prospective jurors James Hearne and Rubin Massey. Defense counsel attempted to question them about their views on whether an indictment was any indication of guilt. Appellant maintains that as a result of such restriction he could not intelligently exercise his peremptory challenges. The following occurred during defense counsel's voir dire of prospective juror Hearne:

"Q. Now, I will ask you if you believe or think or that since a person has been indicted, brought into court, that he might be a little bit guilty?

"MR. ADCOCK [State's Attorney]:

Your Honor, at this time we are going to object to that question, and simply asks (sic) counsel to state the law correctly to the prospective juror; that the Court will instruct him that as a matter of law that the indictment is no evidence of guilt whatsoever and whether or not he could follow that law.

"THE COURT:

The Court will instruct the juror that at the appropriate time, the Court will give you a charge which will contain the statement given earlier to the total panel; that the indictment itself is no evidence of guilt and it should not be considered in any way as evidence of guilt.

"MR. MOLINA [Defense Attorney]:

Your Honor, has the prosecutor's objection been sustained?

"THE COURT:

Yes, sir."

Appellant, citing *Mathis v. State*, 576 S.W.2d 835 (Tex.Cr.App.1979), and *Campbell v. State*, 685 S.W.2d 23 (Tex.Cr.App. 1985), argues that when the trial court sustained the State's objection to his question it impermissibly restricted his voir dire examination.

In the instant case, we have no absolute limitation of appellant's voir dire as that which occurred in *Mathis* and *Campbell*. The State's objection was that appellant's question was not phrased correctly. In sustaining the State's objection, the trial court in no way intimated that appellant could not ask a properly worded question regarding the prospective juror's ability to follow the law. Indeed, the prosecutor's objection informed appellant that the proper question would have been "as a matter of law the indictment is no evidence of guilt whatsoever and whether ... [the prospective juror] could follow that law?" Appellant was not entitled to inquire if the prospective juror felt him to be "a little bit guilty" because of the indictment against him. Unfortunately defense counsel made no attempt to ask a properly phrased question of this venireman. In *Abron v. State*, 523 S.W.2d 405 (Tex.Cr.App.1975), this Court noted that a trial court may disallow questions during voir dire which have been asked in improper form. 523 S.W.2d at 408. We find that this is what occurred in the instant case. The trial court acted properly when it restricted appellant from asking an improperly worded question. *Smith*, 703 S.W.2d at 645; *McCarter v. State*, 478 S.W.2d 524, 527 (Tex.Cr.App. 1972).

As to prospective juror Massey, we find that appellant waived error, if any. During voir dire, appellant also asked Massey if he felt that because appellant had been indicted he "must be a little bit guilty of something." Again the prosecution objected to the use of the words "little bit guilty" and requested the court to instruct Massey that an indictment was no evidence of guilt. The court admonished defense counsel to include in his questions "a sufficient definition of the law so that the witness can correctly respond to the question." The court then instructed Massey that an indictment was no evidence of guilt. The following then occurred:

"MR. BANKSTON [Co-Defense Attorney]:

Your Honor, in all of the conversations—in order so that I won't again transgress on the Court's ruling, did the Court sustain the objection that the prosecutor made? I don't know how to proceed; whether I should ask the same question again or whether I need to rephrase my question or what—

"MR. ADCOCK:

Your Honor, in light of the court's correct statement of the law, I will withdraw my objection.

• • • • • •

"MR. BANKSTON:

Well, we would—even though the prosecutor is withdrawing it, since the Court has already given instructions to the juror, we would ask the court for a ruling as to the prosecutor's objection?

"THE COURT:

The objection is withdrawn. The Court has stated to the prospective juror the law. If you wish the witness to answer the question, I will direct the witness to answer. If not, we will pass on it.

"MR. BANKSTON:

Note our exception to the Court's refusal to give a ruling to the prosecutor's objection. I will move along.

• • • • • •

Your Honor, in view of the court's ruling in limiting the defendant to questions in this area, in essence denying the defendant effective assistance of counsel and denying the defendant the right to intelligently exercise preemptory (sic) strikes, we will pass this witness. *We have no more questions.*" (Emphasis added)

Thus, the record clearly shows that the trial court in no way restricted appellant's right to voir dire prospective juror Massey. At the conclusion of the exchange regarding the State's objection, the trial court clearly invited defense counsel to ask the question again. Nevertheless, defense counsel decided to forego asking the question which he now maintains he was prohibited from asking. Appellant should not now be heard to complain. Appellant's

tenth point of error is without merit and is overruled.

[9] In a multifarious point of error, appellant complains that during the voir dire examination of prospective juror Brian Westbrook the trial court, on several occasions, erroneously sustained the State's objections to appellant's questions. Westbrook testified that he knew several of the police officers who might be witnesses in the case. Thereupon the defense began questioning Westbrook regarding his belief as to the credibility of police officers. Appellant asserts that reversible error was committed when the court sustained the State's objection to the following question:

"You know that we are going to have—in any criminal case you have police officers that are witnesses and, you know, like I said, regular citizens, so there may be a conflict of testimony and that may be in conflict with a police officer's testimony.

So would there be a tendency on your part to believe the police officer's testimony in case there is conflict?"

After this question was asked the State objected and the trial court sustained the objection. Now appellant maintains that he should have been allowed to ask the question. Again, we must disagree with appellant.

A review of the record shows that the trial court was not preventing appellant from exploring this area. Prior to this question appellant had been allowed to explore in depth Westbrook's feelings on this issue:

"Q. I will ask you in this fashion, no matter what the other evidence may show, could you believe that a police officer would take the witness stand and under oath, tell the jury direct lies and misrepresentations?

"A. I believe they could do it, yes. They are people. The ones I know are very much like other people.

• • • • • •

"Q. You know Officers Kennedy and Allsbrooks and Officer Huffman and they are potential witnesses in this case. And as a juror, you would be asked to decide on their testimony and evidence, and because of your relationship as friends or acquaintances, would you tend to believe them just a little bit, no matter how slight, simply because of your prior relationship and you know they are police officers and you know them?

"A. I am not sure that a friendship would sway that, but you know, if a guy's never lied to me, I guess I would tend to believe him more than one that had.

• • • • • •

"Q. Then from your answer, I gather that you are saying these acquaintances, these police officers, in the past had not lied to you, and therefore, you would judge them in that vein?

"A. Well, it's hard to say yes or no to that question, because I don't know what they are going to say in testimony and I don't know whether I will believe them at that time or not. Yes, if they (sic) something believable, I will believe them, probably.

"Q. So I gather from your answer that there might be a problem of believability, as you have stated it; is that correct?

"A. I don't understand what you mean.

"Q. Well, you stated in your answer that you would tend to believe—to believe those police officers; is that correct?

"A. If he told me something that was far out, I wouldn't believe him. If he told me something that sounded to me that could have happened, and, you know, makes it impressive enough, yeah, I could probably believe him."

Appellant then asked the question which is the subject of this point of error. After the court sustained the State's objection, defense counsel began questioning Westbrook about other areas but shortly thereafter defense counsel returned to the subject of police officers' credibility:

"Q. Let me ask you this, Mr. Westbrook. As a juror, naturally you would be a judge of the facts and you would judge the witnesses that come before you.

Would it cause you some discomfort or any discomfort to vote for the death penalty in a case where you might know some of the police officers that testified for the State?

"A. You are saying would it cause me any discomfort?

"Q. Yes.

"A. No. I'm—I don't think it would cause me any discomfort, no matter what was going on. If I voted for it, that was because I believe that is what it should have been.

• • • • • •

"Q. ... [B]ut what we need to know is that because in a capital murder case you are talking and the State is asking for the death penalty, and I am simply asking you that if you were selected as a juror, even though you might know some of the police officers, that you still believe that regardless of that relationship, that you would be a fair and impartial juror to a person accused of capital murder?

"A. I guess well—it seems that you are getting me—leading me towards saying no for this question—

"Q. No, I—

"A. I know. I know, and I understand. It's just the repetition, I guess.

"Q. Yes.

"A. I guess I would tend to believe someone that I knew probably more than someone I didn't know."

Thereupon appellant challenged Westbrook for cause. After the State had rehabilitated the juror, the court overruled appellant's challenge for cause. Defense counsel again questioned Westbrook along the same line:

"Q. Do you still believe, sir, Mr. Westbrook, that because you know certain people that would be witnesses, that there would be a slight leaning towards them, that you would believe them more as to others because of your prior relationship with them?

"A. No. I have answered that no before, I think.

"Q. Uh-huh. Well, he asked it and I asked it and I had to reask it.

"A. Okay. No, I wouldn't."

Clearly, defense counsel was not prohibited from questioning the prospective juror regarding his friendship with one of the witnesses or that the witness was a police officer and how such would affect how he would judge the witness's credibility. Counsel was allowed extensive voir dire examination in this area and the trial court was acting within its discretion in excluding repetitious questions. *Patterson v. State*, 598 S.W.2d 265, 272 (Tex.Cr.App. 1980); *McManus*, 591 S.W.2d at 520.

[10] The next two instances about which appellant complains concern Westbrook's feelings about the death penalty versus a life sentence. Initially Westbrook indicated that he personally favored the death penalty over a life sentence for an individual convicted of capital murder. Appellant challenged the venireman for cause. During the State's attempt to rehabilitate the prospective juror, Westbrook acknowledged that his previous answers had been his personal opinion but he could lay that opinion aside and answer the punishment questions strictly on the evidence presented. The court then overruled appellant's challenge for cause. Defense counsel continued his voir dire examination:

"Q. Mr. Westbrook, you said in response to the prosecutor's questions that you had—that you were biased. I believe that's the word that you used. And that you were leaning for the death penalty going into the trial and that was your opinion; is that right?

"A. Well, when asked if it was an opinion, yes. That is my opinion.

"Q. Okay.

"A. When someone says, you know, you are supposed to listen to evidence and decide from it, I could probably handle that, too.

"Q. Now, when in court here, when you say I probably can, or I may be able to, the lawyers will come right back and say, well, let me ask it in this fashion

and see if I can get a more positive answer.

"A. Okay.

"Q. Because of your personal beliefs as to the death penalty and your thoughts, do you think that that would affect the way that you decide on the death penalty or the life sentence?

"MR. WILSON:

Your Honor, here again, he's answering question. He's not saying death penalty or life sentence. He's answering questions, and this question is improperly framed.

"MR. BANKSTON:

Your Honor, was that an objection?

"MR. WILSON:

Yes, we object to it.

"MR. BANKSTON:

What was the objection?

"MR. WILSON:

That it was improperly framed, Your Honor.

• • • • • •

"THE COURT:

I will sustain the objection as it is. You can try to persue (sic) the area of inquiry that you are working on."

Clearly, the court was not prohibiting defense counsel from inquiring as to Westbrook's feelings regarding how the death penalty would affect his deliberations on the punishment issues. The court had allowed both sides much latitude in examining Westbrook in this area. Defense counsel's question was improperly framed and the court was instructing counsel to rephrase his inquiry. Counsel did approached this area again much later in the voir dire examination when he asked the following question:

"Q. Because of your feeling about a life sentence and the parole that is attached to it, as you have expressed it, would that affect you in your thinking and in your decision in deciding between the death sentence and a life sentence?

"MR. WILSON:

Your Honor, I object to that question unless he limits it to his answer to the special issues or would he let that influence him or would he answer those special issues from the facts.

"THE COURT:

Give me a minute. I am going to sustain the objection."

Appellant asserts that in sustaining the State's objection to this question the trial court improperly restricted his voir dire. This is incorrect. The trial court merely sustained an objection to an improperly phrased question. Thereafter defense counsel was allowed to pose the properly phrased question to Westbrook and was allowed to fully investigate Westbrook's feelings in this area:

"Q. In capital murder cases there—in Texas, of course, the sentencing body is the jury, twelve people. You are given factual questions to answer which ultimately will provide the answer as to whether or not the person gets a death sentence or a life sentence.

Because of your feelings in leaning towards the death penalty, would those leanings affect you in deciding on the death penalty as opposed to a life sentence?

"A. After I have heard the facts, probably not. Okay. I will say instead of probably, just no. The facts would probably speak for themselves."

[11] The last two instances about which appellant complains in this point of error concern his inquiry into Westbrook's feelings regarding the minimum punishment of five years for the offense of murder. Defense counsel explained the concept of the lesser included offense of murder to Westbrook. When counsel asked Westbrook if he could envision any murder case in which a five year sentence would be justified, Westbrook replied that he thought five years would be too light of a sentence. The State objected to the line of questioning on the grounds that the defense had earlier waived the minimum punishment of five years in this case. The court gave the following instruction:

"THE COURT:

It is the feeling of the Court that either party can challenge on the minimum sentence issue.

My concern is that when these questions are asked, just flat asked, can you consider the five-year sentence without some kind of preamble to it, we don't get a fair opinion from a juror.

Now that's my concern. I want to get a sufficient preamble to your ultimate question so that we can get the actual feeling of a jury, of a prospective juror; okay?

• • • • • •

The Court will permit interrogation on the question of whether or not he can consider the minimum punishment, but I still state that the preamble—however you phrase that question, it ought to include something about under proper circumstances, can you conceive of a set of circumstances, something like that. To just ask a man, can you give five years for murder, doesn't help us much; okay?"

Defense counsel then resumed his questioning of Westbrook:

"Q. A while back you mentioned something about a life sentence and being out on parole, and does that affect what you thought about the life and the parole business? What you said earlier, does that go into your thinking when you say that five years would be a slap on the hand?

"A. Well, the way I understand the parole system, you do half the time that you are in for, or less. That would mean two and a half years and you would be back on the street.

A guy gets busted with a pound of marijuana, he gets twenty years and spends ten. Murder gets five, that doesn't make sense. I mean, to me that was bigger crime than the guy carrying marihuana down the street and got caught with it, okay? That's ...

"Q. So what you are feeling is that because of the—the way you are thinking and your opinion is that in any given murder case, that you could not consider five years as the sentence.

"MR. GORDON:

I will object unless he preambles it, if the facts to justified (sic) it, can you fairly consider it.

"THE COURT:

It will be sustained."

Once again the sustaining of the State's objection was clearly not a restriction of appellant's voir dire examination. The court had earlier spelled out the proper question. Counsel's question was clearly deficient and the objection was properly sustained.

[12] Following this last interchange appellant challenged Westbrook for cause for several reasons, including that he could never give the minimum punishment for the lesser included offense of murder. Appellant's challenge was overruled after the State rehabilitated the juror; however, defense counsel immediately returned to this area of questioning:

"Q. ... You have pretty strong feelings against the five-year minimum sentence for murder, don't you?

"A. Yes.

• • • • • •

"Q. And I suppose from your answer that those strong feelings that you have against that five-year minimum would affect the way you would decide on punishment on this case?

"A. No.

"Q. It wouldn't at all?

"A. I haven't heard any testimony, therefore, I couldn't even tell you; but if the testimony said that he didn't do it to me, I would definitely say he didn't do it. Okay.

"Q. I am not talking about guilt or innocence.

"A. Okay. After we have established guilt, okay. All right.

"Q. He's guilty of murder and now you have it.

"A. If guilt is established—"

The State objected to this question: "[I]n this case he's charged with capital murder,

and unless he says that he has been found not guilty of capital murder and that only murder is involved, I am going to object to that question. It's misleading." The trial court then instructed: "Counsel, if you will, restrict your questions and phrase them so as to get a specific answer, rather than some general question so that from the answer we get we cannot draw some flat conclusions as to what the feelings of this gentleman are." Appellant's counsel continued:

"Q. Well, let me ask you it (sic) that fashion. If you have found someone not guilty of capital murder and you found him guilty of murder, would those strong feelings that you have against the five-year sentence affect—

"A. I would have to say yes.

"Q. You know, those strong feelings equal that you don't favor a five-year minimum sentence on the murder case; is that about the bottom line?

"A. That's about it.

"Q. And that's how you feel and it would affect you in any murder case regardless of the facts; is that correct?

"MR. ADCOCK:

Your Honor, we are going to object. That was not his answer. He turns and changes it to say, any murder case.

The answer he gave is that he did not favor it. He says, that is correct. And then he turns right around and says, then in any murder case, and that is improper. This gentleman has gone over this—

"THE COURT:

Sustained.

"MR. ADCOCK:

—has gone over this with us many times and I object. It's repetitious.

"THE COURT:

We will sustain."

This latter questioning was clearly repetitious. The trial court properly sustained the State's objection and we find no abuse of discretion in the trial court's actions. Because appellant's voir dire was not improperly restricted, his thirteenth point of error is overruled.

[13] In his twelfth point of error, appellant argues that his voir dire examination of prospective juror Rubin Massey was impermissibly restricted when the trial court prohibited him from asking if he would apply the philosophy of "an eye for an eye" in arriving at what he considered a fair punishment. The State argues that the question was repetitious. We agree with the State.

During his voir dire examination of Massey, defense counsel asked if he could consider a punishment for five years if an accused was found not guilty of capital murder but was found guilty of murder. Thereafter the following occurred:

"Q. But my question is whether or not you would consider that minimum, that five-year sentence, in a murder case where someone has intentionally and knowingly taken the life of a human being without legal justification whatsoever in a case?

"A. If he knowingly took or they knowingly took the life of somebody else without legal justification—

"Q. Intentionally or knowingly, without legal justification, took the life of another human being.

"A. Could I give them five years; no.

"Q. And you couldn't because—and I guess this would in part be because of your religious beliefs that you told me a moment ago. You all have discussed this very situation, crime and punishment, in your Sunday school class. You have discussed that and your beliefs as to that question are based upon your Sunday school discussions; is that correct?

"A. No, sir. It's based upon my reading of the Bible.

"Q. All right. And what would that be; what part of the Bible do you believe that this philosophy is based on?

"A. The Bible tells you 'eye for eye' and 'tooth for tooth.'

"Q. All right. And that is kind of your philosophy; is that correct?

"A. Yes, sir.

. . . . . .

"Q. Now in the event in this particular case, Mr. Massey, that, as a juror—then I take it from what you've told me, that if you were selected as a juror and the jury found that a defendant was not guilty of capital murder, but guilty of murder, then because of these feelings, your religious philosophy, the fact that you believe in this philosophy of an 'eye for an eye' and a 'tooth for a tooth,' that it would be difficult, if not impossible, for you to consider imposing the minimum five-year sentence to a murder case where somebody's life had been intentionally or knowingly taken without legal justification?

"A. Under the circumstances, knowing they took the life deliberately, it would be hard for me to let a man off on five years; yes, sir.

"Q. And that's just not enough in your views?

"A. That's not enough; yes, sir.

"Q. And you wouldn't consider it, then, I take it?

"A. No, sir."

Thereupon the defense challenged Massey for cause. The State rehabilitated the juror and defense counsel resumed his questioning:

"Q. Mr. Massey, I want to make sure you understand what the prosecutor is telling you over here.

Again, it's difficult for you know as we sit here right now what you will do in any particular case without knowing something about that case; but based upon what you indicated to me a moment ago, your philosophy—and this is what I am having to go by, by what you told me—is that some weeks ago you and your Sunday school class sat down and discussed basically this very issue; is that correct?

"A. Yes.

"Q. And it was resolved at that meeting in your church that we were too lenient, as a society, we were too lenient with the people charged with crimes or convicted of crimes?

"A. Yes, sir.

"Q. Is that right?

"A. (sic) You also indicated to me that you are a person who reads the Bible?

"A. Yes, sir.

"Q. And believes in the Bible; is that right?

"A. (nods head affirmatively)

"Q. And one of the philosophies that you have adopted in your religious training is that philosophy that is stated in the Bible that says an 'eye for an eye,' and 'a tooth for a tooth.' And do you firmly believe in that principle of the Bible?

"A. Well, if you got the evidence—you know, you got to weigh the evidence. If somebody kills somebody just to be killing them; yes, I believe they ought to pay.

. . . . . .

"Q. Mr. Massey, again I think when we left off here you indicated that this 'eye for an eye' philosophy was part of your religious beliefs; was that right?

"A. Yes, sir.

"Q. Now again, there is no right or wrong answer, but my question to you, sir, is that if the evidence presented to you and the facts that indicated that there was an intentional and knowing murder without legal justification for that murder—in other words, there was no self-defense, there was no insanity, there was no legal justification for that murder at all, it was an intentional and knowing killing, taking of another human life; could you, sir, if you were selected as a juror in that particular situation, could you consider the very minimum punishment of five years?

"MR. WILSON:

Object to that question, Your Honor. It does not include in it if he felt the facts justified it.

"THE COURT:

Sustained.

"Q. In a case, Mr. Massey, again basing the same—in a particular case, can you—could you if selected as a juror consider five years in a murder case where there had been an intentional and knowing killing without legal justification?

"A. Well, if we have to have it, I would have to weigh the evidence on it.

"Q. If you weighed the evidence, could you consider it after you have weighed the evidence?

"A. Yes, I could consider after weighing the evidence."

At this point the trial court overruled appellant's challenge for cause and defense counsel resumed his questioning:

"Q. And, of course, Mr. Massey, if selected as a juror, the Court is going to tell you—and I think all of the lawyers will agree with this one principle—and that is you are not required to completely ignore your common sense.

You can take your common sense back there and you can apply whatever common sense you have accumulated through your years of experience. And you may—in conjunction therewith, you may apply whatever personal feelings you may have, whether they be religious, philosophical, or whatever. And that would include your previously stated position concerning an 'eye for an eye' and a 'tooth for a tooth.'

Would you, sir, if you were selected as a juror, would you tend to apply that philosophy that you have so earnestly and candidly told the Court, would you apply that philosophy as a juror back there in arriving at what you may consider to be fair punishment? In other words, would you apply the philosophy of an 'eye for an eye' and a 'tooth for a tooth?'

"MR. WILSON:

Object to that as being repetitious, Your Honor.

"THE COURT:

Sustained."

Appellant asserts that this question was not repetitious because he had not previously inquired whether Massey would apply his biblical philosophy in assessing punishment. The record refutes appellant's contention. Clearly appellant had made such inquiries in regard to the assessment of the minimum punishment of five years for the lesser included offense of murder. Clearly the juror had responded that he would base his decision on the evidence and not on his personal philosophy of an "eye for an eye and a tooth for a tooth." In addition, the record shows that appellant, although not using the language of Massey's personal philosophy, received an answer to the inquiry when he posed the following question immediately after the court sustained the objection to the question in issue:

"Q. Hopefully one final question, Mr. Massey. If you found a person guilty of capital murder, would you automatically vote for the death penalty?

"A. No, sir."

We find that the record shows that appellant was allowed to fully explore this area. The court was correct in cutting off repetitive questioning. Appellant's twelfth point of error is overruled.

[14] In another multifarious point of error, appellant alleges that his voir dire was improperly restricted in that his attempts to discuss the meaning of "deliberate" were cut off by the trial court. Appellant points out four such instances:

Prospective Juror McElyea

"Q. ... And I would like to direct your attention, if I may to the first question and that question deals with the delibereateness, the deliberateness or the conduct of the person accused. What does the word 'deliberate' mean to you, ma'am?

"MR. WILSON:

I object to that Your Honor, going into the meaning of terms that are not going to be defined by the Court.

"THE COURT:

Sustained.

"Q. What is your concept of the word 'deliberate'? that's all I am asking. I am not asking what definition you would apply, but as you sit here as a juror right now, what is your concept of the word 'deliberate'?

"A. Intentional."

Prospective Juror Sutton

"Q. My question to you is the word deliberate will not be defined for you. It's whatever definition you happen to use in answering that question. Do you follow me there?

"A. Uh-huh.

"Q. If your definition included—for the word deliberate included premeditation—in other words, it was thought out, planned out; that sort of thing, would you make the State of Texas prove to you beyond a reasonable doubt that in fact it was premeditated before you answered special issue number one yes?

"MR. ADCOCK:

Same objection, Your Honor. He's trying to bind her. We object.

"MR. BANKSTON:

Bind?

"MR. ADCOCK:

Deliberately is a word of common usage. There's no requirement of premeditation. He's trying to define deliberately to have premeditation in it.

"THE COURT:

We sustain the objection, Counsel."

Prospective Juror Massey

"Q. One more question, Mr. Massey. This is the last question. What is your definition of deliberate?

"MR. WILSON:

I am going to object to that, Your Honor; going into definitions and deliberately will not be defined by the Court.

"THE COURT:

Sustained, Counsel."

Prospective Juror Bagnall

"Q. As I indicated to you a moment ago, just as the Court will not define for you what the term reasonable doubt means, the Court will not define for you what the term deliberate means.

I can tell you this. The courts of the State of Texas have said that the word intentional and the word deliberate is not linguistically equivalent. In other words, they, don't mean the same thing. And I think that makes sense in light of what you are asked to do in determining whether or not somebody is guilty of capital murder.

One of the questions you will be asked to decide is whether or not the murder or the death was intentionally caused. And in the event that you resolve that issue against the accused in favor of the State, in other words, you find the accused guilty, then you go on into the punishment phase; and the next question you are asked to resolve is whether or not the conduct was deliberate.

Can you in your own mind see a distinction between those two burdens of proof?

"A. I think I can, yes.

"Q. I think it makes sense to assume that in both instances we are talking about a state of mind of the person who committed the act.

"A. Yes.

"Q. If we were talking about a state of mind that was less than intentional, you would have already determined that question when you said he intentionally did it. So I submit to you that the word deliberate means even more than the word intentionally. Do you agree?

"MR. WILSON:

I would object, Your Honor, to that as to giving a definition of deliberate. It's common ordinary usage. I object to him suggesting what a definition is.

"THE COURT:

Sustained.

"By Mr. Bankston:

"Q. Mr. Bagnall, if you were selected as a juror, I will simply tell you—and I don't believe anybody will argue with this—that as a juror you can use any

definition of deliberate; whatever it means to you. Okay?

"A. Okay."

This Court has faced similar questions in the past. In *Chambers v. State*, 568 S.W.2d 313 (Tex.Cr.App.1978), cert. denied, 440 U.S. 928, 99 S.Ct. 1264, 59 L.Ed.2d 484 (1979), *overruled for other reasons*, and *Grijalva v. State*, 614 S.W.2d 420 (Tex.Cr.App.1980), defense counsel asked the prospective juror whether she thought deliberate conduct meant carefully considered conduct. When the juror responded affirmatively, the prosecutor objected that defense counsel was attempting to infer that the State was required to prove premeditation. The court sustained the objection and refused to allow the defense to explore the matter further. This Court, noting that voir dire examination would take an unreasonable length of time if attorneys on both sides selected different words throughout the contemplated charge and asked each prospective juror what those words meant, found no abuse of discretion. 568 S.W.2d at 323. Two years later the Court made similar holdings in *Esquivel v. State*, 595 S.W.2d 516, 524-525 (Tex.Cr.App.), cert. denied, 449 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980), and *Milton v. State*, 599 S.W.2d 824, 826 (Tex.Cr.App.1980), cert. denied, 451 U.S. 1031, 101 S.Ct. 3022, 69 L.Ed.2d 400 (1980). Unquestionably, the trial judge has discretion to limit the voir dire examination regarding the definition of the term "deliberately." As such, we find no abuse of discretion in the trial court's limitation of appellant's voir dire examination.

[15] Appellant complains that the State was allowed to do what he was not allowed to do; he points to five specific instances in which the State was allowed to explore the definitions of "intentionally" and "deliberately" with the prospective jurors. We set out the pertinent portion of the voir dire examination of prospective Juror Kromer as being representative of the alleged error:

Prospective Juror Kromer

"Q. ... And if you and I were out in public and conversing and we used the word 'intentionally' and the word 'deliberately,' will you agree with me that they are almost synonymous?

"MR. BANKSTON:

Your Honor, in answer to that question, I would like to again impose an objection, in that it is an attempt on the part of the State to bind a juror to a meaning of the word 'deliberate' as has been defined and given to the word 'intentional' under the penal code. As the law of the State of Texas has already been outlined to the Court, the courts have said—the Court of Criminal Appeals have said that the two words are not linguistic equivalents. The prosecutor is attempting to circumvent or go around that opinion by implying to the juror, the prospective juror, that those two words are—in fact mean the same thing, and we object to it as being a misstatement of the law and would ask the Court to instruct the juror that the two words don't mean the same thing.

"THE COURT:

The objection is overruled, but we will tell the juror that the word 'deliberately' has—I mean, the word 'deliberately' has not been defined by our statute, but the word 'intentionally' has been defined by our law.

Proceed, Counsel.

• • • • • •

"Q. I take it in every day life those words would almost be synonymous to you?

"MR. BANKSTON:

Again, Your Honor, we object on the same reason previously stated.

"THE COURT:

Overruled. Proceed, Counsel.

"By Mr. Adcock:

"Q. You may answer the question.

"A. Without knowing the legal definition, then I would have to say yes, they are synonymous in my mind at the moment.

"Q. And this is what I am getting down to. However, in this courtroom, and as you as an officer of the court, when the Judge gives you a charge, he will define to you a definition of the legal word 'intentional' and a person can be held to be intentionally responsible for the commission of a crime if he is simply present and aiding in the commission of a crime.

A good example would be the getaway driver in a robbery case. Even though he didn't go inside a store and point a pistol at anybody or take any money, under our law he could be indicted and found guilty beyond a reasonable doubt that he intentionally robbed someone.

"A. I understand.

• • • • • •

"Q. Now, if you apply that rationale or that reasoning to a murder situation, I think you can see now why the question is to the jury at the punishment stage, did this particular defendant do it deliberately, you see?

"A. Yes, I see that.

"Q. Okay. If you had two people who were involved in a capital murder, like murder during the commission of a robbery, and one man is up front say at a cash register, and another man is in the back of the restaurant and he kills somebody. See the difference? Both of them can be intentionally guilty of capital murder, but only one of them did it deliberately, you see?

"A. Yes, I understand.

"Q. ... So, there is a difference in their meaning and that's why we have—at the punishment stage, we have this hearing as to determine by the jury, from the facts they have heard in either portion, whether or not the defendant acted deliberately, committed the act deliberately."

The record does not support appellant's allegation. The State never asked any of the prospective jurors to define the term "deliberately." The State's questions merely informed the jurors that the terms "deliberate" and "intentional" did not necessarily have the same meaning. The State's questions seemed to follow a general scheme of explaining to the jurors that the terms were not necessarily synonymous while the defense questions were either open-ended or suggested some definition of the term to the jurors. We find that the trial court did not abuse its discretion. Appellant's eighth point of error is overruled.

[16] Finally, in another multifarious point of error and without citation to authority, appellant claims that on numerous occasions the trial court erroneously restricted his voir dire in that, after the State would make a challenge for cause and the prospective juror was passed to the defense for questioning, the trial court limited defense inquiry to the area of the State's challenge for cause. Appellant's brief points out four separate instances where he alleges such restriction occurred. Appellant asserts that this practice denied him effective assistance of counsel in that (1) counsel could not explore other aspects with the prospective juror which might lead him to decline an attempt at rehabilitation and thereby possibly save appellant a peremptory challenge if counsel rehabilitated a juror only to find that he was unacceptable to the defense in other respects, and (2) counsel was unduly restricted in its efforts to rehabilitate jurors because he could not fully explore the complete range of the jurors' thoughts and beliefs.

We have reviewed those four instances and find that in each one defense counsel was in no way restricted from asking the question he desired to ask although the trial court did admonish appellant to stay within the area of the challenge for cause. In each case appellant was allowed to ask the question and he received an answer from the prospective juror. This point of error is without merit. Appellant's fourteenth point of error is overruled.

[17, 18] In his next four points of error, appellant argues that the trial court erroneously overruled several challenges for cause he made to prospective jurors.[5] In

5. In order to present reversible error appellant must show that he was forced to exercise a

points of error three, four and five, appellant complains that his challenges for cause to prospective jurors Berlin, Barbee and Mueller were erroneously overruled when each juror indicated that they would not consider youth as a mitigating factor in determining punishment:

Prospective Juror Barbee

"Q. In deciding—Mr. Barbee, in deciding whether to impose the death penalty, would the youthful age of the person accused be of any significance to you in resolving that decision?

"A. The age that the defendant is?

"Q. Yes.

"A. Would his age—

"Q. Yeah, would the age, the youthful age of any person accused, be of any significance to you in resolving the issue as to whether or not the death penalty ought to be imposed?

"A. No, sir."

Prospective Juror Donald Mueller

"Q. You know, in dealing with the issues that are going to be raised in punishment, all of the evidence is introduced and you are going to be told to base your decision—your decision on those factual issues based upon the evidence. If there was evidence of youthful age of a defendant convicted of capital murder, would you consider that in setting—in answering those factual issues?

"A. As far as being a youthful age?

"Q. Yes, that the defendant is of a youthful age?

"A. No.

• • • • • •

"Q. And that would not be part of your consideration on the death penalty?

"A. Well, now, are you asking me also that—does that consider the—like the, say, life imprisonment to the death penalty? And you are asking if the younger age would make a difference?

"Q. No, let me clarify that. In the two issues that you would be considering, the factual issues—

"A. Okay.

"Q. —dealing with probability and with deliberateness, and in answering yes or no on those factual issues, and in dealing with the death penalty, would you consider youthful age, if it is offered into evidence?

"A. Well, no, no.

"Q. Okay. And that would not enter into the picture of it?

"A. No, I don't think—in my opinion, I don't think the age would make any difference, if, again, the evidence was there. This again, being whether it was not guilty or guilty in my mind, but no, if I felt one way—you know, if the evidence did not, no, I wouldn't let the age get involved with that.

"Q. Now we are talking about punishment.

"A. Yes, sir.

"Q. Okay. So you would set that aside and wouldn't consider it?

"A. No, because, again, I'm looking in my mind at what you are asking me and yet, I would be looking at the complete case that would be over to get to this point of the trial. And I wouldn't say that I could let the age, you know, affect my decision as far as guilty or not guilty.

"Q. Okay. I'm talking about the punishment. I may be misunderstanding your answer, but I'm dealing with only the punishment stage. You have already found him guilty.

"A. Okay.

"Q. And now you are considering just the issues deciding whether a person is sentenced to a life sentence or a death sentence.

"A. Uh-huh.

"Q. And I believe your answer is that you would not consider the young age—

"A. Yes, you are right.

"Q. And that would not enter into your deliberations on setting—on answering those issues; is that correct?

"A. Yes, sir."

Prospective Juror J.R. Berlin

"Q. In dealing with the death penalty and dealing with the factual issues that you have to answer, could you consider as mitigation or in lessening the punishment the youthful age of a person convicted of capital murder?

"A. The youthful age; no."

Appellant challenged each of the prospective jurors for cause on the grounds that they were biased against the law dealing with age and the consideration of age in assessing punishment in a death penalty case. All three of appellant's challenges for cause were overruled and appellant used a peremptory strike upon each. Appellant argues before this Court that each juror was biased against the law applicable to capital punishment and that the trial court should have sustained his challenges per Article 35.16(c)(2), V.A.C.C.P. He relies on *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), and *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), for the proposition that the sentencing authority in capital cases must be permitted to consider any relevant mitigating factor including specifically the youthful age of the offender. We disagree with appellant.

In *Lockett*, the Supreme Court, examining the Ohio death penalty statute, concluded that the Eighth and Fourteenth Amendments require that the sentencing authority in all but the rarest kind of capital murder case not be statutorily precluded from considering any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant may offer as a mitigating factor as to punishment. Four years later, *Eddings* came before the Supreme Court. Eddings was a sixteen-year-old convicted of first-degree murder of a police officer. Although the Oklahoma death penalty statute provided that in a sentencing proceeding evidence could be produced regarding "any mitigating circumstances" and although Eddings, in mitigation, presented evidence of a turbulent family history and emotional disturbance, the trial judge, in imposing the death sentence refused to consider, as a matter of law, for purposes of mitigation the circumstances of Eddings' upbringing and emotional disturbance. Instead he found the only mitigating circumstance to be Eddings' youth, but he held this to be insufficient to outweigh the aggravating circumstances and thereby assessed the death penalty. The trial judge's assessment of the case was affirmed by the Oklahoma Court of Criminal Appeals. Justice Powell, writing for the majority of the United States Supreme Court, reversed, holding:

"We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett*. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no

peremptory challenge to excuse a prospective juror to whom his challenge for cause should have been sustained. He then must show that he exhausted his peremptory challenges and was later forced to accept a juror whom he found to be objectionable. *Green v. State*, 591 S.W.2d 464, (Tex.Cr.App.1979), cert. denied, 446 U.S. 988, 100 S.Ct. 2975, 64 L.Ed.2d 846 (1980). The record in the instant case shows that in addition to the fifteen peremptory challenges authorized by Article 35.15(a), V.A.C.C.P., the trial court authorized appellant to exercise two additional peremptories. Appellant exercised his seventeenth peremptory challenge on prospective juror Warner Rankin, Jr. Immediately after the exhaustion of these strikes, appellant requested additional peremptory challenges. The trial court denied this request. Following the voir dire examination of prospective juror Brian Westbrook, appellant requested an additional peremptory challenge since Westbrook was an objectionable juror. The court denied this request. Similar requests were made as to jurors John Fisher, Loyce Bullington and Judy Barnes. These requests were denied by the trial court. We find that appellant has preserved the issues of the trial court's denial of his challenges for cause for review.

weight by excluding such evidence from their consideration." 455 U.S. at 113–114, 102 S.Ct. at 876–877 (footnotes omitted and emphasis in original).

Clearly then, the law provides that youth is a mitigating factor which must be considered. Failure of the trier of fact at least to consider youth in their determination of punishment constitutes error but the law also provides that in certain circumstances the sentencing authority may not find youth to be a significant mitigating factor in the assessment of punishment:

"Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence. Eddings was a youth of 16 years at the time of the murder. Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation. See *McCautha v. California*, 402 U.S. 183, 187–188, 193, 91 S.Ct. 1454, 1457, 1460, 28 L.Ed.2d 711 (1971). *In some cases, such evidence properly may be given little weight.* But when the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant." *Eddings*, 455 U.S. at 115, 102 S.Ct. at 877 (footnotes omitted and emphasis added).

[19] Article 35.16(c)(2), V.A.C.C.P., provides that a venireman may be challenged for cause and excused if he or she indicates a bias for or prejudice against any of the law upon which any party is entitled to rely. Before such excusal is warranted, however, it must be shown that the venireman is biased for or prejudiced against the *law*. Such a showing was not made in the instant case. Although the three individuals stated it was their personal feeling that they would not consider any person's age in answering the special issues, they were never informed that the law required them to make such a consideration of appellant's age—that in certain citations, depending upon the facts of the particular case, they could give youth little mitigating value in the assessment of punishment but they could not refuse to consider it altogether. Thus none of the three addressed the question of whether they were biased against the *law* since the law was never explained to them. A trial court abuses its discretion in overruling a challenge to prospective jurors when it has been established that the juror can not follow the law. But until such a showing is made the trial court will not be found to have so abused its discretion. In the voir dire examination of a prospective juror in *Von Byrd v. State*, 569 S.W.2d 883 (Tex.Cr.App.1978), cert. denied, 441 U.S. 967, 99 S.Ct. 2418, 60 L.Ed.2d 1073 (1979), the defense posed a question on the range of punishment applicable to the lesser included offense of murder and the prospective juror responded that he did not think he could consider probation as a possible punishment. The defense challenged the venireman for cause. The trial judge then questioned the prospective juror who told the judge that he was not opposed to the "probation law" and could consider probation in a proper case. The trial judge then overruled Von Byrd's challenge for cause. This Court in reviewing the case agreed that the venireman was not subject to a challenge for cause. 569 S.W.2d at 891. See also *Goodman v. State*, 701 S.W.2d 850, 859 (Tex.Cr.App.1985) (during the voir dire examination, prospective juror initially expressed a bias but after the law was explained to him he also indicated he would follow the law); *Barefoot v. State*, 596 S.W.2d 875, 881–886 (Tex.Cr.App.1980), cert. denied, 453 U.S. 913, 101 S.Ct. 3146, 69 L.Ed.2d 996 (1981) (during the voir dire examination, prospective jurors initially expressed a bias but after the law was explained to them they indicated they could follow the law). In the instant case, the prospective jurors were never given the opportunity to testify as to whether they had a prejudice against the law. Under these circumstances, the trial court did not abuse its discretion in denying appellant's challenge for cause. Appellant's third, fourth and fifth points of error are overruled.

[20] In his eleventh point of error, appellant argues that the trial court erred in denying his challenge for cause of prospective juror Leah Sutton after Sutton testified that she would require the defense to produce evidence of appellant's innocence. During voir dire examination by the defense, Sutton testified that even though the trial court instructed her that the State had the burden of proof she would have to hear evidence presented by the defense before she could render a verdict. Appellant immediately challenged Sutton for cause. During the State's attempt to rehabilitate the juror, the following occurred:

"Q. Now, a while ago Mr. Bankston asked you if you felt that the accused could have been guilty, would you vote—would you have to hear from him before you could vote not guilty. Or did he ask you some question similar to that, or I heard some kind—but you understand the burden of proof is over here with us?

"A. With you.

"Q. Right.

"A. No, sir. I guess I didn't get that part.

"Q. All right. And an accused has the right under the law just to rest right with us and simply argue that we didn't meet our burden of proof. You remember I said we had to shut up or put up—

"A. Okay. You are to prove that he's guilty? They are to prove that he is not guilty, is what it comes to?

"Q. They don't have to prove anything.

"A. They can just shut up is what —

"Q. Right. You remember me saying a while ago, I said we have to shut up or put up?

"A. Uh-huh. Okay.

"Q. So, if the Court instructed you that the burden of proof was over here with the State, there's no burden whatsoever on the accused, could you follow that?

"A. Yeah. I understand it now.

"Q. And then I take it that your answers then to Mr. Bankston's questions is that you could follow the law and you would put no burden on the accused?

"A. Right. And I was saying I had to hear both sides.

"Q. Uh-huh.

"A. I am getting it a little straighter (sic) now.

• • • • • •

"THE COURT:

The Court will charge the jury that the burden of proof is on the State and always remains on the State. It never shifts. Do you understand that?"

The prospective juror indicated that she understood and the trial court asked if she had been confused by the earlier questions. The prospective juror answered "yes." The trial court then asked, "All right. Now, with that understanding, is your answer still the same or would you change your answer in any way?" The venireman stated, "I would have to change it, sir." Thereupon the trial court overruled appellant's challenge for cause. Appellant renewed his challenge for cause after the following colloquy:

"Q. [By Defense Counsel] Well, let's suppose that the defendant—or let's suppose the State of Texas brought you what you felt like was evidence that a person was guilty. Then you would, I take it, require—you would look to this table over here and you would require this table or the defendant's table to come forward and present to you some evidence to indicate that he was not guilty; is that right or wrong?

"A. That's correct, because this side would have already proved to me that he is guilty.

• • • • • •

"Q. But you would expect and you would require, the, the defendant to come forward and present evidence to the contrary; is that right?

"A. Yes, sir."

The court again overruled the challenge for cause. Defense counsel resumed his questioning:

"Q. Mrs. Sutton, after the State of Texas rests—and I might explain that process to you. The State always goes first in the presentation of evidence. And once they feel like that they have

presented to you all of the evidence that is necessary for them to present, they will stand up and say, Your Honor, the State rests, which means we are through at the moment.

At that time if the State were to stand up and say, Your Honor, we rest our case, at that time would you require the defendant to come forward and present evidence of his innocence.

"A. No, sir. From what I have gathered here today, they do not have to.

"THE COURT:

Okay. Mrs. Sutton, I again inform you and instruct you that if you are selected on this panel, the court will give you a written charge in which it will tell you that the burden of proof is always on the State and ... remains with the State throughout the trial process.

In addition to that, I will tell you that you are obligated to follow the instructions that are given to you, not withstanding any personal belief. Can you follow those instructions?

"VENIREWOMAN SUTTON:

Yes, Sir.

* * * * * *

"Q. [By Defense Counsel] Mrs. Sutton, I am going to go back one more time, and as I explained to you the procedure a moment ago, once the State rests, that signals the end of their case.

My question to you, ma'am, is if the State rested, would at that time you then expect and require the defendant to come forward and present to you evidence of his innocence?

"A. No, sir."

At the conclusion of the examination of the prospective juror, appellant exercised a peremptory strike against her.

A reading of the entire voir dire shows that initially Sutton misunderstood the law regarding the burden of proof; however, after the law was explained to her, she clearly indicated that she understood the State always had the burden of proof, the defendant was not required to put on evidence to establish his innocence, and that she would follow the law regarding the burden of proof. The trial court correctly overruled appellant's challenge for cause. This point of error is therefore overruled.

[21] In his fifteenth point of error, appellant argues that he was deprived of a jury of his peers when the State was allowed to challenge for cause any prospective juror who was excludable under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), because of his or her views regarding the death penalty. He asserts that this resulted in the seating of a jury predisposed to find guilt. The United States Supreme Court decided this issue against appellant in the case of *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). Appellant's fifteenth point of error is overruled.

[22] In his sixteenth point of error, appellant complains that the trial court erred in denying his motion to quash the venire because, he argues, the system used in picking potential jurors diluted the representation of women and minorities. The crux of appellant's contention is that by relying only upon the voter registration lists a large number of citizens who have not registered to vote are excluded from jury duty with a high proportion of these individuals being women and minorities.

The record shows that on February 1, 1984, appellant filed his original motion to quash the venire. In this motion he alleged under-representation of young adults from the ages of 18 to 25. On May 14, 1984, appellant filed an amended motion to quash the venire; in this motion he expanded his allegations to include blacks and Hispanics. On May 15, 1984, a pretrial hearing was conducted regarding the amended motion. At that time, the trial court asked appellant if he had any supporting evidence to present. Appellant replied that he did not have any evidence at that time but he would have supporting evidence "in a few days." Appellant asked the court to carry the motion along until he could present evidence in support of the motion. The court instead denied appellant's motion but advised appellant that he could reargue it later. Voir dire began that day and was concluded on June 20, 1984. On June 21, 1984, over strenuous objection by the State, the trial court allowed appellant to present evidence "of the nature of a bill."[6] Prior to the presentation of the evidence, however, the trial court renewed his denial of appellant's motion to quash the array. The State asserts that because appellant failed to present evidence on his amended motion to quash at the time it was initially presented to the trial court he waived his opportunity to challenge the array; we agree.

In *Esquivel v. State*, 595 S.W.2d 516 (Tex.Cr.App.1980), cert. denied, 449 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980), the defendant orally raised his first challenge to the array *during* the trial court's initial questioning of the jury panel. The trial court noted that he would consider the challenge to the array as being filed. When defense counsel asked for the opportunity to present evidence in support of his challenge prior to the voir dire examination by the parties, the court announced that he would not consider any evidence. The court then overruled Esquivel's challenge to the array because it had not been timely presented. This Court citing the language of Article 35.06, V.A.C.C.P., agreed with the trial court. 595 S.W.2d at 523. We find the instant case analogous to *Esquivel*. Article 35.06 provides that "[t]he court shall hear and determine a challenge to the array *before* interrogating those summoned as to their qualifications" (emphasis added). Thus, the Code of Criminal Procedure clearly provides that the determination of the challenge to the array must be made before the voir dire examination begins. In the instant case appellant timely filed his challenge to the array and the court overruled it before voir dire examination began; however, appellant did not present evidence in support of his motion until *after* the jury had been selected and sworn. Because this evidence was not presented in a timely fashion—indeed, was presented after the jury was seated following a month long voir dire—we will not consider it. Accordingly, this point of error is overruled.

[23] In his seventeenth point of error appellant alleges the trial court erred in admitting his confession into evidence because, he argues, testimony at the pretrial hearing established that interrogation continued after appellant had invoked his right to remain silent. The record establishes otherwise.

During the hearing on appellant's motion to suppress his confession, Detective J.D. Huffman of the Haltom City Police Department testified that at approximately 6:30 p.m. he went to the boarding house where appellant was staying to inquire about him. While he was talking to the landlord, appellant walked out from a bedroom in the back of the house and began going up the hall toward the living room where Huffman was standing. Huffman testified that he approached appellant and asked him his name and inquired if he had ever been in trouble with the law. Appellant identified himself and told Huffman that he was currently on parole. Huffman related that at that point he believed that appellant might be connected with the offense. Although he did not arrest appellant, Huffman advised him of his constitutional rights: specifically he asked appellant if he would like to have a lawyer and if he would like to remain silent. Appellant replied negatively to both inquiries. Huffman then asked appellant if he knew anything about the victim's car, stereo and television. Appellant replied he did not and said that he had been at the house all day. Huffman testified that he noticed appellant had become "real nervous and hesitant." When appel-

6. When the State protested that it was unable to adequately present a defense in such short notice, the trial court, explained:

"What I'm simply trying to do ... is basically let him make his record for the purpose of a bill. I don't want to put the State at some disadvantage unduly with this.

"If a recess would help us and give them a minute to review some of this now that you kind of see the format that he is using, then you may get with him informally let him show you what he's doing, it might enable us to move a faster."

7. The trial court, as in *Esquivel*, did not rule on the merits of appellant's motion. 595 S.W.2d at 523.

lant turned around and began walking back down the hall to his bedroom, Huffman stopped him and advised him that he was under arrest for the investigation of capital murder. Appellant was then taken to the city jail where he was warned by a magistrate. This warning occurred at 6:55 p.m. Appellant was then placed in a jail cell where he remained until approximately 12:30 a.m. Meanwhile the detectives were engaged in the activities of obtaining and executing a search warrant of appellant's room and obtaining the autopsy results of the victim. Detective Huffman testified that when he returned from the autopsy, at 12:15 a.m., he intended to finish some paperwork and then go home but first he instructed Detective W.B. Allsbrook to fingerprint and photograph appellant so that they would not have to do it the following morning. Allsbrook testified that as he took appellant out of his cell appellant asked him what was going to happen. Allsbrook replied that it was up to appellant. Appellant then began talking about the offense. Allsbrook testified that he stopped appellant immediately in mid-conversation and, after reading him the warnings, Allsbrook asked appellant if he wanted an attorney present and if he wanted to waive his right to remain silent. Appellant replied he did not want an attorney and that he just wanted to talk about the offense. At this point Allsbrook summoned Detective Huffman. Appellant was taken into an office and again given his warnings. Huffman again asked appellant if he wished to have an attorney present and if he wished to waive his right to remain silent. Appellant replied that he wanted to talk to Huffman and he did not need a lawyer. Appellant then began giving an oral statement regarding the offense. Following the giving of the oral statement, it was reduced to writing and signed by appellant.

Appellant asserts that he indicated his wish to terminate questioning and to invoke his right to remain silent at the boarding house when he turned away from Detective Huffman and attempted to go back into his room. Detective Huffman testified he too interpreted appellant's actions as indicating appellant's desire to terminate the interview.

We will approach appellant's contention from two different aspects. First, it is clear from the record that appellant was not in custody and thus not under custodial interrogation when he "invoked" his right to remain silent. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), defines custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444, 86 S.Ct. at 1612.

Detective Huffman repeatedly testified that appellant was not under arrest and he did not feel it was necessary to arrest appellant until after appellant turned and started to walk back into his room. We find that the claimed invocation of the right to remain silent was not made during any custodial interrogation. See *Cannon v. State*, 691 S.W.2d 664, 671 (Tex.Cr.App. 1985), cert. denied, 474 U.S. 1110, 106 S.Ct. 897, 88 L.Ed.2d 931 (1986) (defendant's claimed invocation of the right to counsel not made during any custodial interrogation).

[24] Second, even if we determine that appellant was in custody at the time he invoked his right to remain silent, the record shows that he later knowingly and voluntarily waived that right when he initiated the conversation regarding the offense with Detective Allsbrook. Immediately after appellant indicated to Detective Huffman that he wanted the interview at the boarding house to terminate, he was placed under arrest and given his warnings again. Appellant was then transported to the city jail where he was immediately taken before a magistrate who also informed him of his rights. These warnings were reduced to writing and signed by appellant. Appellant was then taken to the booking room, allowed access to a telephone and then placed in jail. Some six hours passed before Detective Allsbrook woke appellant up in order to fingerprint and photograph him. No interrogation occurred during this time. Allsbrook testified as he was taking appellant out of his cell appellant asked him what was going to happen. When Allsbrook replied that it was up to appellant, appellant immediately began talking about the crime. Allsbrook stopped him in midstream and gave him his warnings again, specifically asking appellant if he wanted to waive his right to remain silent. Appellant said he wanted to talk about the offense. Before Detective Huffman began interviewing appellant, he again went over appellant's rights. Once again appellant was specifically asked if he would like to have an attorney present. Appellant replied that he did not need an attorney. Huffman also asked appellant if he would like to remain silent or if he would waive his right to remain silent. Appellant stated that he would like to talk to Huffman. When Huffman asked appellant what he wanted to talk about, appellant replied that he wanted to talk about the offense. Appellant then gave his confession.

The record shows that appellant's request to terminate the questioning was "scrupulously honored." *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). Appellant clearly initiated the conversation with Allsbrook. Cf., *Hearne v. State*, 534 S.W.2d 703 (Tex.Cr. App.1976). Thus no violation of appellant's rights occurred when he gave his confession. *Phillips v. State*, 701 S.W.2d 875, 891 (Tex.Cr.App.1985), cert. denied, 477 U.S. 909, 106 S.Ct. 3285, 91 L.Ed.2d 574 (1986). The trial court properly admitted appellant's confession into evidence. Appellant's seventeenth point of error is overruled.

[25] In three points of error, appellant contends that his motions to quash the indictment should have been granted and the State should have been compelled to set out the elements of aggravated rape, robbery and burglary of a building.[8] We have consistently held that the allegation of the constituent elements of the offense constituting the aggravating feature of a capital murder charge is unnecessary, even in the face of a motion to quash. *Andrade v. State*, 700 S.W.2d 585, 589 (Tex.Cr.App. 1985), cert. denied, 475 U.S. 1112, 106 S.Ct. 1524, 89 L.Ed.2d 921 (1986); *Hammett v. State*, 578 S.W.2d 699, 708 (Tex.Cr.App. 1979), cert. denied, 448 U.S. 725, 100 S.Ct. 2905, 65 L.Ed.2d 1086 (1980); *Smith v. State*, 540 S.W.2d 693, 697 (Tex.Cr.App. 1976), cert. denied, 430 U.S. 922, 97 S.Ct. 1341, 51 L.Ed.2d 601 (1977). Appellant's nineteenth, twentieth and twenty-first points of error are overruled.

In a related point of error, appellant argues that the trial court erred by not quashing the indictment because it failed to specify the exact mode of theft and the exact mode of robbery the State was seeking to prove. We find this contention to be without merit. As we noted above, in a capital murder case the indictment need not allege the elements of the offense constituting the aggravating offense. *Andrade*, 700 S.W.2d at 589 and the cases cited therein. Appellant's twenty-second point of error is overruled.

[26] Next appellant argues that V.T.C.A., Penal Code, Section 19.03(a)(2) is unconstitutional because, although the statute assigns capital sanctions to the intentional commission of murder "in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson," the statute actually prescribes the death penalty for a larger number of crimes including two versions of kidnapping—regular and aggravated, two versions of robbery—regular and aggravated, and no less than four versions of burglary—burglary of a habitation, burglary of a building, burglary of a vehicle and burglary of a coin-operated machine. Appellant asserts that this ambiguity in the

8. Appellant was charged with capital murder in a three count indictment. The first count of the indictment contained three paragraphs, with each paragraph alleging a different manner of capital murder. The first paragraph alleged that the murder was committed in the course of the commission of or an attempt to commit an aggravated rape. The second paragraph alleged that the murder was committed in the course of the commission of or an attempt to commit a robbery. The third paragraph alleged that the murder was committed in the course of the commission of or an attempt to commit a burglary of a building.

statute causes the statute to be so vague as to be unconstitutional.

This contention has been previously decided against appellant. In *Jurek v. State*, 522 S.W.2d 934 (Tex.Cr.App.1975), affirmed *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), this Court examined the constitutionality of Article 1257, V.A.P.C.[9] In answering the question of whether the statute guarded against the arbitrary and standardless imposition of the death penalty, the Court found that the statute

> "limits the circumstances under which the State may seek the death penalty to a small group of narrowly defined and particularly brutal offenses. This insures that the death penalty will only be imposed for the most serious crimes It also insures that the death penalty will only be imposed for the same type of offenses which occur under the same types of circumstances." *Jurek v. State*, 522 S.W.2d at 939.

The Court further found that coupled with the stringent safeguards of Article 37.071, V.A.C.C.P., the Texas death penalty scheme provided against the arbitrary imposition of the death penalty; consequently, we find appellant's contention to be without merit. Appellant's twenty-third point of error is overruled.

[27] Prior to the trial court's submission of the charge on punishment to the jury, appellant requested four special charges. The requested charges asked the court to specifically instruct the jury that in answering the special issues they should consider the appellant's age, the appellant's maturity level, the appellant's personal social history and background and any relevant extenuating circumstances. The court refused to submit these charges. Now appellant argues that the denial of these specially requested charges foreclosed the jury from considering the individuality of the appellant and thereby violated the Eighth and Fourteenth Amendments to the United States Constitution.

Since appellant has filed his brief in this Court, the Supreme Court has issued it opinion in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). There the Court determined that the Texas death penalty statute was unconstitutional as applied because the statutory jury instructions, Article 37.071 V.A.C.C.P.,[10] provided no vehicle for the jury to express its "reasoned moral response" and thus give mitigating effect to Penry's evidence of mental retardation and childhood abuse. No such conclusion in warranted in the case before us today.

Clearly to meet constitutional muster, the sentencing authority in a capital case must be allowed to consider all relevant mitigating evidence. *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). The United States Supreme Court, in examining Article 37.071 in regards to a juror's consideration of mitigating evidence, explicitly held that "the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a death sentence," *Jurek v. Texas*, 428 U.S. 262, 274, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), and prior to *Penry*, this Court had held that the questions prescribed under Article 37.071 allowed the jury to grasp the logical relevance of mitigating evidence, and as such there was no need to further charge the jury regarding evidence of mitigating circumstances. *Stewart v. State*, 686 S.W.2d 118, 121 (Tex.Cr.App.1984), cert. denied 474 U.S. 866, 106 S.Ct. 190, 88 L.Ed.2d 159 (1985); *Quinones v. State*, 592 S.W.2d 933 (Tex.Cr.App.), cert. denied 449 U.S. 893, 101 S.Ct. 256, 66 L.Ed.2d 121 (1980). After *Penry*, however, in those particular cases where evidence is presented that 1) is mitigati in nature, 2) is relevant to a juror's determination that death would or would not be the appropriate "reasoned moral response" to the defendant's particular circumstances, *and* 3) the mitigating effect of the evidence cannot be considered under the statutory special issues, the trial court judge is required to submit to the jury "instructions informing the jury that it could consider and give effect to the [particular] mitigating evidence ... by declining to impose the death penalty." *Penry*, 492 U.S. at 328, 109 S.Ct. at 2952.[11]

Appellant has failed to direct our attention to where in the record there exists mitigating evidence that would give rise to "*Penry*" special instructions. Nevertheless, from our reading of the record we find that the only evidence offered at trial, even arguably mitigating in nature, was either presented to the jury in the context of the second special issue or was not shown to be significantly relevant to a juror's "reasoned moral response." Consequently, we conclude that the trial court was not required to submit appellant's instructions to the jury.

First, there is evidence that appellant came from a "disruptive family" and had a "tragic" family life.[12] There is also evidence that appellant was an "average" student and a "good worker." However, no further explanation is given and no attempt is made to relate this evidence to whether death in this case would or would not be a "reasoned moral response" to appellant's circumstance. The phrase "reasoned moral response" was given special significance in the *Penry* decision. The Court specifically held that in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background "we conclude that the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its decision." 492 U.S. at 328, 109 S.Ct. at 2952. The phrase can be traced to *Brown v. California*, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987), where Justice O'Connor wrote:

> "In my view, evidence about the defendant's background and character is relevant because of the belief held by this society that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. This emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence. As this Court observed in *Eddings*, the common law has struggled with the problem of developing a capital punishment system that is 'sensible to the uniqueness of the individual.' 455 U.S. at 110 [102 S.Ct. at 874]. *Lockett*

9. Article 1257 was the immediate predecessor to Section 19.03 and was worded substantially the same. The pertinent part of Article 1257 read as follows:
> "(b) The punishment for murder with malice aforethought shall be death or imprisonment for life if ... (2) the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson."

10. Under our capital sentencing procedure a jury, after finding the evidence sufficient to establish guilt, is required to answer three special issues:
> "(1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
> "(2) whether there is a reasonable probability that the defendant would commit criminal acts of violence that would constitute a threat to society; and
> "(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Article 37.071, V.A.C.C.P.

11. The Supreme Court failed to understand that under Texas law the jury does not "impose the death penalty." The jury in a capital case decides three special issues and, upon an affirmative finding to each, "the court shall sentence the defendant to death." Article 37.071(e) V.A.C.C.P. As such, the high Court failed to inform this Court how the jury is to give "mitigating effect" to mitigating evidence that is not capable of being considered outside the special issues.

12. This evidence was presented through the State's witnesses who were called to testify as to appellant's bad reputation in the community from which he came. Appellant did not attempt to offer evidence independent of this. The jurors were not informed of what was meant by a "disruptive family" or "tragic family life" and how such affected appellant and/or the circumstances of the offense.

and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. *Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's character, background, and crime rather than mere sympathy or emotion.*" 479 U.S. at 545 [107 S.Ct. at 841] (O'Connor, J., concurring) (emphasis added).

Subsequent to *Brown*, Justice O'Connor repeated the phrase in her concurrence in *Franklin*, 487 U.S. at 184, 108 S.Ct. at 2333, which was elevated to a holding in the *Penry* decision. From what we can discern, allowing the jury to express its "reasoned moral response" means something more than affording the jury the opportunity to express its "sympathy or emotion" towards the defendant and as such the evidence presented must be the same or of similar character and quality as that found in *Penry*.

Certainly the evidence before us today is not of the same quality and character that the Supreme Court faced in *Penry*. There the Court confronted evidence demonstrating that Penry suffered from organic brain damage and moderate mental retardation. He was shown to have had a gruesome upbringing where as a youth he was beaten frequently resulting in a variety of learning and behavioral dysfunctions in his adult life. The Supreme Court determined that such mitigating evidence "ha[d] relevance to his moral culpability beyond the scope of the special issues and that the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment." 492 U.S. at 322, 109 S.Ct. at 2948. The evidence in this case, however, does not fit into the Supreme Court's rubric of allowing the jury to express its reasoned moral judgment. The evidence is unrelated to any aspect of how or why death in this case would or would not be an appropriate response to appellant's actions and the nonspecific facts of appellant's life are no where comparable to that found in *Penry*.

It should be remembered that *Penry* implicitly reaffirmed the facial constitutionality of the Texas death penalty laws. 492 U.S. at 318, 109 S.Ct. at 2946–2947 (Supreme Court noting that "the facial validity of the Texas death penalty statute had been upheld in *Jurek* on the basis of assurances that the special issues would be interpreted broadly enough ... [and that] Penry argues that those assurances were not fulfilled *in his particular case* ..." [emphasis in the original]). See also *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 1081, 108 L.Ed.2d 255 (1990) (Supreme Court noting constitutionality of Texas death penalty after *Penry* decision). If we were to hold that the slightest bit of good character testimony, not shown to be relevant to the offense or the offender and yet available to all, warranted a special instruction in every case, we would have serious doubts as to the statute's constitutionality. See *Furman v. Georgia*, 408 U.S. 238, 309–310, 92 S.Ct. 2726, 2762, 33 L.Ed.2d 346 (1972) (Stewart, J., concurring). Thus, the nonspecific nature of the testimony before us today along with the testimony's dissimilarity to that found in the *Penry* case lead us to conclude that the trial court did not err in refusing to instruct the jury with appellant's specially requested charges.

[28] There is also mitigating evidence of appellant's youth; appellant was twenty-one years old at the time of the offense. The mitigating affect of this testimony, however, was presented to the jury in the context of his ability to reform. Charles Walker, general counsel for the Texas Board of Pardons and Parole, testified and defense counsel argued before the jury that the older a person becomes the more likely he is to turn away from crime. Thus, the jury was allowed under special issue number two to give mitigating affect to appellant's youth and find that because of such he would not pose a future threat to society. See *Russell v. Lynaugh*, 892 F.2d 1205, 1214–1215 (5th Cir.1989); *Mccoy v. Lynaugh*, 874 F.2d 954, 966 (5th Cir. 1989). See also *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (plurality opinion). Accordingly, appellant's last point of error is overruled.

Having found no reversible error, we affirm the judgment.

CLINTON and MALONEY, JJ., dissent for reasons given in *James v. State*, 805 S.W.2d 415, 417, n. 3, (Tex.Crim.App.1990) and in *Ex parte Goodman*, — S.W.2d — (Tex.Cr.App., No. 70,887, delivered May 29, 1991). They further dissent for the reasons given in *Boyd v. State*, 811 S.W.2d 105 (Tex.Cr.App.1991); *Boggess v. State*, — S.W.2d — (Tex.Cr.App., No. 69,990, delivered May 29, 1991), and *Lackey v. State*, — S.W.2d — (Tex.Cr.App., No. 69,144, delivered May 29, 1991).

BAIRD, J., not participating.

Clifton Robert DILLEHEY, Appellant,

v.

The STATE of Texas, Appellee.

No. 472–90.

Court of Criminal Appeals of Texas, En Banc.

June 19, 1991.

Rehearing Denied Sept. 18, 1991.

Defendant, who pled guilty to possession of cocaine and was placed on deferred adjudication pursuant to plea bargain, requested and received permission to appeal trial court's order overruling his motion to suppress evidence from the Criminal District Court No. 3, Dallas County, Mark Tolle, J. The Dallas Court of Appeals, Fifth Supreme Judicial District, 788 S.W.2d 154, dismissed appeal on grounds that it lacked jurisdiction to address appeal from deferred adjudication probation. Defendant sought discretionary review. The Court of Criminal Appeals, Miller, J., held that defendant could appeal denial of his motion to suppress evidence from deferred adjudication probation under provisions of article of code of criminal procedure authorizing State's, not defendant's right to appeal.

Court of Appeals reversed and case remanded.

Baird, J., dissented and filed opinion joined by McCormick, P.J., and Campbell and White, JJ.

Criminal Law ⇐1026

Defendant could appeal from deferred adjudication probation pursuant to provisions of article of code of criminal procedure which authorized State's, not defendant's, right to appeal. Vernon's Ann.Texas C.C.P. arts. 42.12, § 5(a), 44.01(j); art. 42.12, § 3d(a)(1988); V.T.C.A., Government Code § 311.027.

Tim K. Banner, Hal E. Turley, Dallas, for appellant.

John Vance, Dist. Atty., and Yolanda M. Joosten and Gregg Long, Asst. Dist. Attys., Dallas, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

MILLER, Judge.

In this cause, appellant plead guilty to possession of cocaine and was placed on deferred adjudication pursuant to a plea bargain. The trial court placed appellant on probation for three years and fined appellant five hundred dollars. Art. 42.12, Sec. 3d(a), V.A.C.C.P. (see now Sec. 5(a)). Appellant requested and received permission from the trial court to appeal the trial court's order overruling his motion to suppress evidence (the cocaine). The Court of Appeals dismissed the appeal citing lack of jurisdiction to address an appeal from a deferred adjudication. *Dillehey v. State*, 788 S.W.2d 154 (Tex.App.—Dallas 1990).

The issue upon which we granted appellant's petition is whether or not a defendant can appeal from a deferred adjudica-

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NO. 91-6751

IN THE

SUPREME COURT OF THE UNITED STATES

JOE MARIO TREVINO, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

Brief in Opposition to
Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Respondent respectfully prays that no writ of certiorari issue to review the judgment of the Court of Appeals for the Second Court of Appeals District of Texas.

OPINIONS AND JUDGMENTS BELOW

The Texas Court of Criminal Appeals affirmed Petitioner's conviction on June 12, 1991. Trevino v. State, 815 S.W.2d 592 (Tex.Cr.App. 1991). Judges Clinton and Maloney dissented to the opinion with a note, and Judge Baird did not participate in the Court's decision. Petitioner sought rehearing on three issues; his Motion for Rehearing was denied on September 18, 1991. Mandate issued October 16, 1991.

STATEMENT OF THE CASE

In early 1983, Petitioner raped and murdered eighty-year old Blanche Miller. Petitioner's trial occurred in mid-1984, and a jury convicted him of capital murder. He was sentenced to death by lethal injection. Appeal to the Court of Criminal Appeals was automatic.

SUMMARY OF THE ARGUMENT

Petitioner presents four questions. The first question implicates issues regarding Powers v. Ohio, 499 U.S. ___, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) and Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). For the first time in the appellate process, Petitioner implies that remand for a Batson hearing has been denied him. Although this issue was available prior to the submission of this cause to the court below, this question has not been pressed or passed on and should not now be considered for the first time.

Petitioner's second question focuses on the exclusion of a psychological evaluation. He argues that this ruling constituted a reversible exclusion of mitigating evidence. However, the trial court did not abuse its discretion in excluding this exhibit when Petitioner failed to lay the proper predicate for its introduction.

Petitioner's third question for review raises a straight Penry claim. Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Petitioner argues that evidence showing his disruptive childhood home fell outside the scope of the special issues submitted during punishment. The State maintains that this evidence did not rise to the level of that in Penry.

Petitioner's fourth question raises a Penry issue, juxtaposed with the trial court's regulation of *voir dire* examination. Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Petitioner complains that the trial court refused to excuse three veniremen whose beliefs were contrary to the mitigation evidence he sought to rely upon during punishment. However, Petitioner improperly attempted to commit these veniremen to a specific finding with respect to their consideration of punishment evidence, and his complaint also relies on a misreading of Eddings v. Oklahoma, 102 S.Ct. 869, 455 U.S. 104, 71 L.Ed.2d 1 (1982) and Lockett v. Ohio, 98 S.Ct. 2954, 438 U.S. 586, 57 L.Ed.2d 972 (1978).

ARGUMENT

- I -

POWERS V. OHIO / BATSON V. KENTUCKY

For the first time, Petitioner appears to request a remand for a Batson hearing. He urges this request under the auspices of Powers v. Ohio, 499 U.S. ___, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) and Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

On direct appeal to the Texas Court of Criminal Appeals, Petitioner voiced a fair cross-section complaint concerning the manner in which his jury was selected. U.S. Const. amend. VI and XIV. Petitioner's brief was filed on December 23, 1985, prior to this Court's decision in Batson. Several months after this Court's opinion in Batson, the State filed its reply brief and a supplemental brief. Both of these State's briefs analyzed the application of this Court's landmark Batson decision to the instant cause. Subsequently, oral argument before the Texas Court of Criminal Appeals and formal submission of this cause occurred on July 2, 1986. See A-1. Although this Court's pronouncements in Batson preceded the submission of this case to that Texas court and despite the fact that both of the State's briefs addressed the newly decided case, Petitioner never requested a remand for a Batson hearing in this cause. The Texas Court of Criminal Appeals correctly determined Petitioner's fair

cross-section argument lacked merit. Trevino, 815 S.W.2d at 598. The Court of Criminal Appeals did not pass on the question of a remand.

In his motion for rehearing, Petitioner assailed the Texas Court's implied determination that his fair cross-section complaint should not be elevated to a Batson - equal protection argument. Again, Petitioner never requested the Court remand the cause for a Batson hearing. Indeed, the State's reply to the request for rehearing specifically pointed out Petitioner's failure to request such a hearing on remand. The State noted that one possible strategic reason for such an omission was the fact that the *voir dire* record showed clear-cut racially-neutral reasons for striking the veniremen in question. In other words, the futility of achieving any relief on the merits of a Batson claim *vis-a-vis* a hearing on remand was evident under the extant record.

Now, for the first time in the appellate process, Petitioner appears to request his cause be remanded for a Batson hearing. While not actually articulating such a request in his petition, he assails the Texas court's failure to order a hearing on remand - even though he has never requested this relief. Pet. for Cert. at p. 14. The State maintains that this request lacks merit.

Petitioner urges this Court to invoke its jurisdiction and implies the need for remand under Ford v. Georgia, 498 U.S. ___, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991). In Ford, this Court

refused to retroactively apply a state rule to procedurally bar the Petitioner's Batson claim when 1) that rule was not in existence at the time of the trial in question and 2) the rule's own authors determined it should only be applied prospectively. *Id.*, 111 S.Ct. at 858. For two reasons, Petitioner's claim lacks merit. First, unlike Ford, our case does not involve the retroactive application of a state procedural rule to bar Petitioner's claim. Petitioner's failure to voice a request for remand is the sole impediment.

A second reason undermines the propriety of Petitioner's request for review. This Court has repeatedly held that questions "not pressed or passed on below" will not be considered. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 2321-25, 76 L.Ed.2d 527 (1983) (applied to State's failure to challenge the availability of a well-settled federal remedy); Hill v. California, 401 U.S. 797, 91 S.Ct. 1106, 1111, 28 L.Ed.2d 484 (1971) (this Court refused to reach a complaint which was not raised, briefed, nor argued in the state appellate court). As evidenced by the State's briefing of this case before the Texas Court of Criminal Appeals, Batson issues were within the realm of contemplation during the pendency of this appeal. Indeed, these issues were alive prior to the original submission of Petitioner's cause before the Court of Criminal Appeals. Petitioner's belated attempt to request such relief should not succeed when this argument was viable months prior to submission of his cause, yet

unaddressed on original submission and even in his motion for rehearing.[1]

While it is not entirely clear whether this rule is jurisdictional or prudential, nevertheless, consideration of Petitioner's newly raised contention would subvert the sound justifications for this rule. Illinois v. Gates, 103 S.Ct. at 2323-24. Therefore, Petitioner's attempted piecemeal litigation of his appellate claim should not prevail. Review should be denied.

- II -

TEXAS YOUTH COUNCIL REPORT

In his second question presented, Petitioner complains that exclusion of the Texas Youth Council Report during the punishment phase of trial constituted a reversible exclusion of mitigating evidence. The Texas Court of Criminal Appeals found Petitioner failed to lay the proper predicate for introduction of this exhibit under the Business Records Act and that the contents of the excluded report were not reliable. Trevino, 815 S.W.2d at 597.

Petitioner cites Creech v. Arave, 928 F.2d 1481, 1488 (9th Cir. 1991), for the premise that a sentencer may rely on

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1 Clearly, this chronology reveals that this case does not involve a right not recognized. See, Black v. State, ___ S.W.2d ___ (Tex. Crim. App. Slip Op. No. 69,648, delivered May 28, 1991) (mandate issued July 19, 1991).

information from extrinsic sources, including a presentence report which contained statements of mental health practitioners and other hearsay information. Reliance on Creech, however, is misplaced. The defendant in that cause complained of a confrontation violation due to his inability to confront the hearsay declarants. *Id*. Creech is also distinguishable on another basis. The trial judge who sentenced Creech judicially noticed the contents of the presentence report in that cause. *Id*. Creech does not involve the exclusion of evidence proffered by the defense, let alone the exclusion of evidence due to the defense's failure to fulfill the predicate for admission. It cannot control our disposition.

Petitioner also refers us to United States v. Versaint, 849 F.2d 827, 832 (3rd Cir. 1988), and contends that the State failed to make an affirmative showing that the youth council report Petitioner sought to introduce was unreliable. Petitioner fails to acknowledge that Versaint requires such a showing based on the federal business records exception to the hearsay rule. That exception allows admission "unless the sources of information or other circumstances indicate lack of trustworthiness." Fed.R.Evid. 803(8). The business records act applicable to Petitioner's trial did not contain any similar requirement for an affirmative showing of unreliability. Trevino, 815 at 597 n. 1 (quoting Tex.Civ.Stat. art. 3731a and art. 3737e, repealed

September 1, 1986). Therefore, Petitioner's reliance on Versaint is misplaced.

Furthermore, although the Texas business records exception does not place any burden on the State to affirmatively show unreliability, the State undermined any showing of reliability of Petitioner's exhibit when the prosecutor proved the falsity of the certification. R. XXXVI - 834. Moreover, the Texas Court of Criminal Appeals found the proffered exhibit unreliable based upon its double hearsay contents. Trevino, 815 S.W.2d at 597. Thus Petitioner cannot prevail on this issue, even in light of the more stringent federal rule concerning admissibility of business records.

It should also be noted that, for the first time, Petitioner argues that the State failed to make an affirmative showing of the untrustworthiness of the report in question. This question of the State's burden to make such a showing should not be considered because it was "not pressed or passed on below." Illinois v. Gates, 103 S.Ct. at 2321-25; Hill v. California, 91 S.Ct. at 1111. Petitioner's question does not warrant an invocation of this Court's jurisdiction.

- III -

PENRY* - *DISRUPTIVE CHILDHOOD

Petitioner contends that his mitigation evidence fell outside the scope of the special issues submitted at the punishment phase and, therefore, violated this Court's holding in Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989); Article 37.071, V.A.C.C.P. Petitioner specifically argues that evidence of his "disruptive" childhood home constituted Penry evidence and mandated an additional instruction to allow the jury to consider and give effect to this mitigation evidence.

Petitioner's evidence did not constitute proof of significant mitigating potential. The Texas Court of Criminal Appeals correctly determined that Petitioner did not present any Penry evidence. Trevino, 815 S.W.2d at 622. Circumstances are relevant to the mitigation of punishment when they disclose aspects of the defendant's background and character which render that criminal actor less culpable based on society's long-held belief that illegal acts can be attributable to such circumstances. See California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J. concurring); U.S. Const. amend. VIII.

As in this case, the Texas Court of Criminal Evidence has previously held that similar evidence fell outside the ambit of Penry evidence. For instance, relying on this Court's opinion in Penry, Judge Baird wrote that evidence of childhood mistreatment

did not rise to the level of Penry evidence. Earhart v. State, ___ S.W.2d ___ (Tex.Cr.App. Slip Op. No. 70,343 at 43, delivered September 18, 1991). Accord Lackey v. State, 816 S.W.2d 392 (Tex.Cr.App. 1991) (turbulent childhood not Penry evidence); Lewis v. State, 815 S.W.2d 560, 567 (Tex.Cr.App. 1991) (vague testimony that the defendant often had bruises and did not have a "happy childhood," unsupported by specific facts, did not raise a *bona fide* mitigation issue).

Unlike the double-edged evidence presented in Penry, this vague evidence could have been given full effect within the submitted issues. See Franklin v. Lynaugh, 487 U.S. 164, 108 S.Ct. 2320, 2330, 101 L.Ed.2d 155 (1989). Petitioner's question for review does not merit further litigation.

- IV -

PENRY - VOIR DIRE CONSIDERATION OF YOUTHFULNESS

Petitioner's fourth question focuses on another aspect of Penry evidence. Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). He contends that three veniremen's "avowed unwillingness" to consider his youth as mitigation evidence violated this Court's requirement that the sentencer be permitted to weigh relevant mitigating evidence of the defendant's background and character.

During *voir dire*, Petitioner sought to commit three veniremen concerning their consideration of youth as a mitigating

factor when assessing punishment. R. XX - 1925-26; XXI - 2213-15; XXII - 2282-83. On direct appeal, the Texas Court of Criminal Appeals correctly determined that the trial court's exclusion of Petitioner's improper attempt to bind these three veniremen to a particular finding without affording them any explanation of the applicable law. Trevino, 815 S.W.2d 599. Jurors are not required to give any particular weight to mitigating evidence in a capital case. Cordova v. State, 733 S.W.2d 175, 189 (Tex.Cr.App. 1987), cert. denied, 108 S.Ct. 2915 (1988) (citing Eddings and Lockett). Contrary to these authorities, Petitioner sought to bind the three veniremen in question to affirmatively consider his youth as mitigation of the death penalty.

Petitioner's contention is based on a misreading of Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 972 (1978). While these cases require a state's capital murder scheme to permit the defense to introduce any punishment mitigation evidence, these cases do not require the sentencing authority to commit, during *voir dire*, to what facts they will consider as mitigating. Lockett recognized that a capital sentencer "must be ***permitted*** to consider any relevant mitigating factor." Eddings, 102 S.Ct. at 875 (emphasis added). Therefore, the Court of Criminal Appeals correctly overruled Petitioner's point of error; this question does not merit review.

CONCLUSION

Petitioner's trial and conviction do not present facts which necessitate review by this Court. For the above reasons, a Writ of Certiorari to review the decision of the Texas Court of Criminal Appeals would be inappropriate.

Respectfully submitted,

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APPENDIX

A-1

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

JOE MARIO TREVINO

V. NO. 69,337

THE STATE OF TEXAS

June 2, 1986

The above case is set for submission Wednesday, July 2, 1986. Within 15 days from this date, NOTIFY this office whether or not oral argument is desired and advise opposing counsel. Failure to request oral argument within such time constitutes waiver thereof.

Thomas Lowe, Clerk

ORIGINAL

FILED
FEB 14 1992
OFFICE OF THE CLERK

No. 91-6751

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOE MARIO TREVIÑO, JR.,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

Petition for Writ of Certiorari to the
Court of Criminal Appeals of the State of Texas

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OCTOBER TERM, 1991

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No. 91-6751

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOE MARIO TREVINO, JR.,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

Petition for Writ of Certiorari to the
Court of Criminal Appeals of the State of Texas

REPLY BRIEF FOR THE PETITIONER

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Joe Mario Trevino, Jr., presents this Sup. Ct. R. 15.6 reply brief, addressed to arguments first raised in respondent State of Texas's brief in opposition to the pending petition for writ of certiorari.

Reply to Respondent's Jurisdictional Objection to First, Batson Question

The respondent state would rest this Court's jurisdiction to review the federal constitutional injury inherent in prosecutors' peremptory exclusion of all African-Americans from petitioner Trevino's capital murder jury, not upon whether the accused pressed for consideration of the federal constitutional injury in the state courts; but rather upon whether the accused presciently requested, in the state courts, the specific, eventually accepted form of relief[1]: the state argues that this Court's jurisdiction fails, simply because petitioner Trevino did not accompany his repeated explications of the federal constitutional injury in state court, with a specific request for a remand specifically for "a Batson hearing."

But "a personal constitutional right," to stand trial for one's life before a jury from which persons of one race have not been systematically eliminated, for example, may certainly be pressed in state court "separate[ly]" from the "judicially created remedy designed to safeguard" and applied "routine[ly]" to violations of the right, Illinois v. Gates, 462 U.S. 213, 223 (1983); and consequently, the sufficiency, for purposes of this

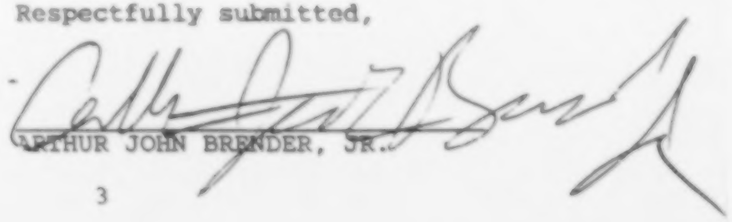
[1]He did. Petitioner Trevino asked his trial court time and again to conduct a hearing to elicit the prosecutors' "reasons" for having peremptorily stricken the African-Americans, 27 Rec. 3294; 30 Rec. 6-7; and again, on appeal, petitioner urged the state's Court of Criminal Appeals to "adopt[]" such a hearing procedure as a matter of right in such cases and thereafter remand petitioner's case to the lower court for a new trial. Brief of the Appellant at 16-17, Trevino v. State, 815 S.W.2d 592 (Tex. Crim. App. 1991).

Court's jurisdiction, of presentation of the "personal constitutional right" in state court is certainly not dependent upon the particular relief requested in that court, see, e.g., Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 471 n.3 (1988), nor, especially where "erroneous imposition of the death sentence" may have resulted, upon "citation to book and verse," Eddings v. Oklahoma, 455 U.S. 104, 113 n.9; id. at 117 n.* (O'Connor, J. concurring); see also, e.g., Beck v. Alabama, 447 U.S. 625, 630 n.6 (1980), but rather, upon the explication of enough of a factual basis for the personal constitutional right to allow the court itself to discern from such facts - just as this Court has done in Batson v. Kentucky, 476 U.S. 79, 84 n.4 (1986) and Ford v. Georgia, 498 U.S. ___, 111 S. Ct. ___, 112 L.Ed.2d 935, 946-47 (1991) - the specific federal constitutional provision which must be brought to bear. Braniff Airways v. Nebraska State Bd. of Equalization & Assessment, 347 U.S. 590, 598-99 (1954); Dewey v. Des Moines, 173 U.S. 193, 200-01 (1899).

Conclusion

WHEREFORE, all premises of his petition and this reply considered, petitioner prays the writ of certiorari issue.

Respectfully submitted,



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(5)

SUPREME COURT OF THE UNITED STATES

JOE MARIO TREVINO *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 91-6751. Decided April 6, 1992

PER CURIAM.

I

The State of Texas charged petitioner Joe Mario Trevino for the murder and rape of Blanche Miller, a capital offense. On February 1, 1984, before jury selection, petitioner filed a "Motion to Prohibit the State from Using Peremptory Challenges to Strike Members of a Cognizable Group." The motion recited:

> "The Accused requests of the Court that the State of Texas be prohibited from its use of peremptory challenges to strike prospective jurors merely based on the fact of race. The prosecution, the State of Texas, historically and habitually uses its peremptory challenges to strike black people and other minorities who are otherwise qualified. These peremptory challenges are exercised by the State of Texas to strike prospective black jurors in its effort to produce an ethnically pure, all white, jury. This common use of the State's peremptory challenge in a criminal trial deprives the Accused of due process and a fair trial. This practice deprives the Accused of a jury representing a fair cross-section of the community in violation of the Sixth Amendment to the United States Constitution.
>
> A hearing is requested on this Motion." 1A Record 280.

The trial court delayed ruling on the motion until the *voir dire*. During the course of *voir dire*, the prosecution

exercised its peremptory challenges to excuse the only three black members of the venire. After each of these peremptory strikes, petitioner, who is Hispanic, renewed his motion, asking that the prosecution state its reasons for striking the jurors. The first time petitioner renewed the motion, the court stated: "I know of no requirement yet for either party to announce his reasons for exercising a preemptory [*sic*] challenge. Can you cite me some law on that?" 11 Record 356. In response, petitioner's counsel cited *McCray* v. *Abrams*, 576 F. Supp. 1244 (EDNY), aff'd in part and rev'd in part, 750 F. 2d 1113 (CA2 1984). He went on to note that when we denied the petition for a writ of certiorari in *McCray* v. *New York*, 461 U. S. 961 (1983), five Justices expressed the view that *Swain* v. *Alabama*, 380 U. S. 202 (1965), ought to be reexamined. 11 Record 356. The trial court denied petitioner's motion, and denied it again after two more black venire members were excluded.

The all-white jury returned a verdict of guilty and after a sentencing hearing returned affirmative answers to the two special questions posed by the court. See *Jurek* v. *Texas*, 428 U. S. 262, 267–269 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). As required under such circumstances, see *ibid.*, the trial court sentenced petitioner to death. Petitioner appealed to the Court of Criminal Appeals of Texas, filing his brief on December 19, 1985. This is the cause now before us. He cited 24 errors in the guilt and punishment phases of the trial court proceedings. The only one of concern now is the prosecutor's use of peremptory challenges based on race.

Petitioner contended in the Court of Criminal Appeals that the prosecution's race based use of challenges violated his "rights to due process of law and to an impartial jury fairly drawn from a representative cross section of the community." Brief for Appellant in No. 69337, p. 11. He found these rights in "the Sixth and Fourteenth Amendments to the United States Constitution," as well as provisions of the Texas Constitution. *Ibid.* He asserted he was renewing the objections pressed at trial. *Ibid.* He

acknowledged that under *Swain* v. *Alabama*, the use of peremptory challenges to discriminate in a single case would not be an equal protection violation but noted that in *Batson* v. *Kentucky*, cert. granted, 471 U. S. 1052 (1985), we would reconsider the question under the Sixth Amendment. When his brief was filed, we had heard oral argument in *Batson*, but had not announced our decision. Petitioner urged that even if *Batson* did not alter the requirement of alleging an overall scheme of discrimination, the Court of Criminal Appeals should prohibit peremptory challenges based on race as a matter of state law.

On April 30, 1986, not long after petitioner filed his brief in the Court of Criminal Appeals, our decision in *Batson* came down. *Batson* v. *Kentucky*, 476 U. S. 79. The case announced the now familiar rule that when a defendant makes a prima facie showing that the State has exercised its peremptory challenges to exclude members of the defendant's racial group, the State bears the burden of coming forward with a race neutral justification. Just over a month after *Batson* was decided, the State filed its brief in the Court of Criminal Appeals. The State argued *Batson* could not avail petitioner because he is not a member of the same race as the excluded jurors. According to the State, petitioner's claim could not be considered an equal protection claim but was instead a claim that he was entitled to a jury composed of a "fair cross-section" of the community. Brief for Appellee in No. 69337, pp. 15–17. In drawing this distinction, the State relied on the view that a criminal defendant does not state an equal protection claim unless he alleges that the excluded jurors are members of the same protected class as he. We rejected this view last Term in *Powers* v. *Ohio*, 499 U. S. ___ (1991).

The Court of Criminal Appeals of Texas, sitting en banc, affirmed petitioner's conviction and sentence on June 12, 1991, and denied petitioner's application for rehearing on September 18, 1991. The opinion of the Court of Criminal Appeals does not set forth the reason for the delay of over five years between the submission of briefs and the resolution of the appeal. With respect to the peremptory chal-

lenge question, the court stated that the argument was foreclosed by *Holland* v. *Illinois*, 493 U. S. 474 (1990), in which we held that the Sixth Amendment does not prohibit the prosecution from exercising its peremptory challenges to exclude potential jurors based on race. 815 S. W. 2d 592, 598. In a footnote, the Court of Criminal Appeals stated that the arguments in petitioner's brief did not amount to reliance on the Equal Protection Clause. *Id.*, at 598, n. 3. The court's opinion cited neither *Powers* nor *Ford* v. *Georgia*, 498 U. S. ___ (1991), which we decided on February 19, 1991. We now grant certiorari.

II

In *Ford* v. *Georgia*, we addressed what steps a defendant in a criminal case was required to take to preserve an equal protection objection to the State's race based use of peremptory challenges during the pre-*Batson* era. Here we consider whether petitioner took those steps.

In *Ford*, the petitioner filed a pre-trial "Motion to Restrict Racial Use of Peremptory Challenges," 498 U. S., at ___, wording which is in all material respects parallel to the present petitioner's pre-trial "Motion to Prohibit the State from Using Peremptory Challenges to Strike Members of a Cognizable Group." The ultimate issue in *Ford* concerned the validity of a state procedural rule, but before reaching it we ruled on a preliminary issue, and that ruling is dispositive here. We stated:

> "The threshold issues are whether and, if so, when petitioner presented the trial court with a cognizable *Batson* claim that the State's exercise of its peremptory challenges rested on the impermissible ground of race in violation of the Equal Protection Clause of the Fourteenth Amendment. We think petitioner must be treated as having raised such a claim, although he certainly failed to do it with the clarity that appropriate citations would have promoted. The pretrial motion made no mention of the Equal Protection Clause, and the later motion for a new trial cited the Sixth Amendment, not the Fourteenth." *Id.*, at ___.

Despite the inartfulness of the *Ford* petitioner's assertion of his rights, we held he had presented his claim to the trial court. We noted that his reference in his motion to exclusion of black jurors "over a long period of time," and his argument to the same effect "could reasonably have been intended and interpreted to raise a claim under the Equal Protection Clause on the evidentiary theory articulated in *Batson*'s antecedent, *Swain* v. *Alabama*." *Id.*, at ___. We placed this interpretation on the reference to history because the standard of proof for an equal protection violation under *Swain* required a showing of racial exclusion in "case after case." 380 U. S., at 223.

In the matter now before us petitioner also relied on a claim of a historical pattern of discriminatory use of peremptory challenges. That alone would have been sufficient under *Ford* to place the equal protection claim before the trial court. Of course, petitioner did more. He made an express reference to *Swain* in his argument to the trial court. 11 Record 356. In fact, petitioner argued that we would modify *Swain*'s burden of proof and that the Texas courts should anticipate our decision. We decide that petitioner presented his equal protection claim to the trial court.

We determine further that petitioner preserved his equal protection claim before the Court of Criminal Appeals. His argument caption made an express reference to the Fourteenth Amendment and the issue presented for review was the very one that he had raised before the trial court.

The State in its brief to the Court of Criminal Appeals recognized that petitioner's argument contained an equal protection claim, albeit one which the State believed to lack merit. The State did not argue that petitioner was not making an equal protection claim but that petitioner's equal protection claim had no legal support. Given our later holding in *Powers* v. *Ohio*, *supra*, the State's contention is incorrect.

We cannot ignore the fact that were we to hold petitioner had forfeited his equal protection claim by failing to state it with sufficient precision, we would be applying a stricter standard than applied in *Batson* itself. There petitioner had conceded in the state courts that *Swain* foreclosed a direct equal protection claim, and he based his argument on the Sixth Amendment and a provision of the Kentucky Constitution. *Batson* v. *Kentucky*, 476 U. S., at 83. Yet we treated his allegation of a violation of the Fourteenth Amendment as sufficient to present the question. *Id.*, at 84–85, n. 4. Because petitioner's case is here on direct review, he is entitled to the rule we announced in *Batson*. Compare *Griffith* v. *Kentucky*, 479 U. S. 314 (1987) (giving retroactive application to *Batson* for cases pending on direct review or not yet final when *Batson* was decided) with *Teague* v. *Lane*, 489 U. S. 288, 296 (1989) (denying similar application for cases on collateral review).

The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted, the judgment of the Court of Criminal Appeals of Texas is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.